

**THE PROTECTION OF WORKERS IN THE CASE OF
BUSINESS TRANSFERS: A COMPARATIVE STUDY OF THE
LAW IN THE USA, UK AND SOUTH AFRICA**

1994

Ada Antonia Henriette ver Loren van Themaat

PhD

University College London



**THE PROTECTION OF WORKERS IN THE CASE OF BUSINESS TRANSFERS:
A COMPARATIVE STUDY OF THE LAW IN THE USA,
UK AND SOUTH AFRICA.**

ABSTRACT

Business transfers and accompanying business changes are a focal point for the tension between the protection of rights of employees, including their "property rights" in the job and their "right" to meaningful participation, and the interests of management in achieving its economic objectives effectively. A comparison of the law in the United States, South Africa and the United Kingdom can cast the divergent interests, which become conspicuous during corporate reorganisations, into bold relief, and suggest how those interests can be reconciled.

This study shows that conventional labour law with its emphasis on voluntarism has not been able to resolve the basic conflict between the economic demands for restructuring and rationalisation (one of the main consequences of the global economy), and the social demands for workers' protection. By arguing that collective bargaining has never succeeded in effectively mitigating the power of management over the workforce, pluralist support of voluntarism is criticised.

The main point that emerges from the comparison of the way in which the three countries deal with the phenomenon of structural business changes and the effect of such changes on workers, is that law, even though its effectiveness to bring about major changes in an industrial relations system is limited, can make some difference. Law can intervene in labour relations to set standards and lay down procedures for the exercise of managerial prerogative; specifically, law can introduce the values of liberal society into the workplace, such as rationality, fairness, and respect for individual rights. This study shows how, through the introduction of some of these values, legislation for the protection of workers' acquired rights, can provide a solution to the tension between managerial prerogative and employees' rights.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS	7
TABLE OF CASES	8
TABLE OF LEGISLATION	21
CHAPTER 1	29
Introduction	29
Introduction	29
Law and industrial relations in the United States of America	33
Law and industrial relations in the United Kingdom	36
Law and industrial relations in South Africa	39
Pluralist model	44
Law as a source of power	47
Ineffective law	50
Legislative intervention for the regulation of business transfers	56
1. Respect for the rights of employees: automatic transfer of rights and the prohibition against dismissal	59
2. Rationality: economic, technical and organisational reasons for dismissal; insolvency	60
3. Fair procedure: consultation	64
(a) Notice	65
(b) Attention	66
(c) Explanation	67
4. Democracy	70
Conclusion	73

CHAPTER 2	75
The protection of workers in the case of business transfers: United States of America	75
Introduction	75
Employment-at-will	75
Insolvency	78
Obligations of the transferor	81
1. Collective bargaining theory	81
<i>Introduction</i>	81
<i>Collective bargaining and the Wagner Act</i>	81
2. Application of collective bargaining theory in general	83
<i>Categories of bargaining</i>	83
<i>Effect</i>	88
<i>Disclosure</i>	90
3. Application of collective bargaining theory - business transfers	92
<i>Type of transaction</i>	92
<i>Duty to bargain</i>	93
<i>Disclosure</i>	104
<i>Effects-bargaining</i>	104
<i>Proactive conduct by the union</i>	105
Obligations of the transferee	107
Introduction	107
<i>John Wiley & Sons v Livingston</i>	108
<i>NLRB v. Burns International Security Services, Inc.</i>	110
<i>Howard Johnson Co. v. Detroit Local Joint Executive Board</i>	113
Conclusion	115
 CHAPTER 3	 118
The Protection of workers in the case of business transfers: United Kingdom	118
Introduction	118
The common law position	118

The creation of a "European social area"	121
The Transfers Directive	123
1. Objective	123
2. Scope	125
3. Transfer of rights and obligations	129
4. Consent	132
5. Collective provisions	134
6. Protection against dismissal	135
Implementation of the Transfers Directive in the UK	136
1. Application	137
2. Dismissals arising in the context of a business transfer	143
3. Dismissal for an economic, technical or organisational reason	144
Redundancy and reorganisation	146
Insolvency	153
Obligations to negotiate or consult	160
1. Collective bargaining theory	160
2. Application of collective bargaining theory in general	162
<i>Collective bargaining</i>	162
<i>Consultation</i>	164
<i>Disclosure</i>	166
3. Application of theory - business transfers and redundancies	168
<i>Consultation</i>	168
<i>Information</i>	175
Conclusion	176
CHAPTER 4	178
The protection of workers in the case of business transfers: South Africa	178
Introduction	178

The common law position	179
Transfer - piercing the corporate veil	184
Insolvency	189
Obligations of the transferor	193
1. Collective bargaining theory	193
<i>Introduction</i>	193
<i>Collective bargaining and the Labour Relations Act</i>	194
<i>Pluralist model</i>	199
2. Application of collective bargaining theory in general	202
<i>Duty to bargain</i>	202
<i>Disclosure</i>	206
3. Application of collective bargaining theory - business transfers and redundancies	208
<i>Duty to consult</i>	208
<i>Severance pay</i>	217
<i>Consultation about effects</i>	223
<i>Disclosure</i>	225
<i>Proactive conduct by the union</i>	227
Conclusion	232
CHAPTER 5	234
Conclusion	234
BIBLIOGRAPHY	241

ACKNOWLEDGEMENTS

Portions of this thesis and my understanding of labour law have benefited from the suggestions and advice of experts and professionals on three continents. My supervisor, Professor Bob Hepple, with his tremendous expertise, first drew my attention and interest to the field, and has been a constant, patient source of encouragement, information and helpful criticism. Professor Martin Brassey of the University of the Witwatersrand, Professor Barbara Fick of the University of Notre Dame, and Professor Clive Thompson of the University of Cape Town read and commented on the chapters that most directly bear on their respective country's labour law. My previous colleagues of the University of South Africa have always shown an interest in my work. Professor Marinus Wiechers has been extremely supportive, and Professor Neville Botha read an entire draft, improving its style and substance. Heleen Ferreira assisted with the technical aspects of printing.

Financial support for the research has been generously given by University College London in the form of a teaching assistantship, the South African Attorneys Fidelity Fund, the Overseas Research Students Award Scheme of the Committee of Vice-Chancellors and Principals of the Universities of the United Kingdom, the Bradlow Foundation in combination with the Human Rights Institute at the University of Notre Dame. The research itself was made possible by the staff and collections of the following libraries: Institute of Advanced Legal Studies, London; Library of the University of Notre Dame, South Bend, Indiana; Library of Congress, Washington, D.C.; Library of the University of South Africa, Pretoria; Library of the University of the Witwatersrand, Johannesburg; Library of the University of Pretoria and Library of the University of Stellenbosch.

To my parents and family I owe the deepest gratitude. Their help and interest have always been an inspiration. My sister, Catrin, has been a master at finding elusive references. My husband, Greg, has been an unfailing supporter. Our daughter, Catrin, has provided necessary relief and more during the first two wonderful years of her life.

<h2 style="margin: 0;">TABLE OF CASES</h2>
--

UNITED STATES OF AMERICA	Page
<i>Adair v. U.S.</i> , 208 U.S. 161 (1908).	75
<i>Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co., Chemical Division</i> , 404 U.S. 157 (1971).	86,87
<i>Bob's Big Boy Family Restaurants</i> , 264 NLRB 1369 (1982).	92
<i>Brockway Motor Trucks v. NLRB</i> , 582 F.2d 720 (3rd Cir. 1978).	85
<i>Brooks Scanlon, Inc.</i> , 246 NLRB 4766 (1979).	84
<i>Creasy Co.</i> , 268 N.L.R.B. 1425 (1984).	105
<i>Cruse Motors, Inc.</i> , 105 NLRB 242 (1953).	113
<i>Curtiss-Wright Corp. v. NLRB</i> , 347 F.2d 61 (3d Cir. 1964).	90
<i>Darlington Manufacturing Co.</i> , 139 NLRB 241 (1962), <i>enforcement denied</i> , 325 F.2d 682 (4th Cir. 1963), <i>vacated and remanded</i> , 380 U.S. 263 (1965).	95,96
<i>Detroit Edison Co. v. NLRB</i> , 440 U.S. 301 (1979).	91
<i>Fall River Dyeing and Finishing Corp.</i> , 107 S.Ct. 2225 (1987).	92
<i>Fibreboard Paper Products Corp. v. NLRB</i> , 130 NLRB 1558 (1961), <i>reversed</i> , 138 NLRB 550 (1962), <i>enforced</i> , 322 F.2d 411 (D.C. Cir. 1963), <i>affirmed</i> , 379 U.S. 203 (1964).	31,85,93-95,100,104
<i>First National Maintenance Corp. v. NLRB</i> , 452 U.S. 666 (1981).	31,56,84,85,92,96,97-104,105
<i>Fortune v. National Cash Register</i> , 364 N.E. 2d 1251 (Mass. 1977).	77
<i>Geary v. U.S. Steel Corp.</i> , 319 A. 2d 174 (Pa. 1974).	76
<i>General Motors Corp. v. NLRB</i> , 470 F.2d 422 (D.C. Cir. 1972).	31,88
<i>Golden State Bottling Co. v. NLRB</i> , 414 U.S. 168 (1973).	92,116
<i>Howard Johnson Co. v. Detroit Local Joint Executive Board</i> , 417 U.S. 249 (1974).	31,92,105,113,114,115
<i>Hutton v. Watters</i> , 132 Tenn. 527, 179 S.W. 134 (1915).	75

<i>I.A.M. v. Northeast Airlines, Inc.</i> , 473 F.2d 549 (1st Cir.), cert. denied, 409 U.S. 845 (1972).	85
<i>IBT Local 115 v. De Soto, Inc.</i> , 725 F.2d 931 (3d Cir. 1984).	107
<i>Illinois Coil Spring Co. (Milwaukee Spring I)</i> , 265 NLRB 206 (1982), rev'd, 268 NLRB 601 (1984).	106
<i>International Ass'n of Machinists Dist. Lodge 94 v. NLRB</i> , 414 F.2d 1135 (D.C. Cir. 1969).	115
<i>International Ass'n of Machinists v. Howmet Corp.</i> , 466 F.2d 1249 (9th Cir. 1972).	116
<i>International Union, UAW v. NLRB</i> , 765 F.2d 175 (D.C. Cir. 1985).	106
<i>International Woodworkers v. NLRB</i> , 263 F.2d 483 (D.C. Cir. 1959).	90
<i>Jackson v. Minidoka Irrigation District</i> , 563 P.2d 54 (Idaho 1977).	76
<i>John Wiley & Sons v. Livingston</i> , 376 U.S. 543 (1964).	108-110,114,115,116
<i>Mahoning Mining Co.</i> , 61 NLRB 792 (1945).	93
<i>McGuire v. Humble Oil & Ref. Co.</i> , 247 F. Supp. 113 (S.D.N.Y. 1965).	110
<i>Milwaukee Spring II</i> , 268 NLRB 601 (1984), enforced sub nom <i>International Union, UAW v. NLRB</i> , 765 F.2d 175 (D.C. Cir. 1985).	106
<i>Molders Local 155 v. NLRB (United States Pipe & Foundry Co.)</i> , 442 F.2d 742 (D.C. Cir. 1971).	86
<i>Monge v. Beebe Rubber Co.</i> , 316 A.2d 549 (1974).	77
<i>NLRB v. Acme Indus. Co.</i> , 385 U.S. 432 (1967).	89
<i>NLRB v. Adams Diary</i> , 350 F.2d 108 (8th Cir. 1965).	88
<i>NLRB v. Aluminum Tubular Corp.</i> , 299 F.2d 595 (2d Cir. 1962).	89
<i>NLRB v. American Nat'l Ins. Co.</i> , 343 U.S. 395 (1952).	86
<i>NLRB v. Armato</i> , 199 F.2d 800, 803 (7th Cir. 1952).	113
<i>NLRB v. Bildisco & Bildisco</i> , 465 U.S. 513 (1984).	80
<i>NLRB v. Burns International Security Services, Inc.</i> , 406 U.S. 272 (1972).	31,110-113,114,116
<i>NLRB v. Clegg</i> , 304 F.2d 168 (8th Cir. 1962).	90

<i>NLRB v. Emsing's Supermarket</i> , 872 F.2d 1279 (7th Cir. 1989).	105
<i>NLRB v. Insurance Agents' Int'l Union</i> , 361 U.S. 477 (1960).	99
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962).	86
<i>NLRB v. National Car Rental Sys.</i> , 672 F.2d 1182 (3d Cir. 1982).	89
<i>NLRB v. Rapid Bindery, Inc.</i> , 293 F.2d 170 (2d Cir. 1961).	89
<i>NLRB v. Reed & Prince Mfg. Co.</i> , 205 F.2d 131 (1st Cir. 1953).	86
<i>NLRB v. Royal Plating & Polishing Co.</i> , 350 F.2d 191 (3rd Cir. 1965).	88
<i>NLRB v. Truitt Manufacturing Co.</i> , 351 U.S. 149 (1956).	90
<i>NLRB v. Wooster Div. of Borg-Warner Corp.</i> , 356 U.S. 342 (1958).	84
<i>Otis Elevator Co.</i> , 269 NLRB 891 (1984).	100-102, 104
<i>Ozark Trailers, Inc.</i> , 161 NLRB 561 (1966).	90
<i>Payne v. Western & A. R.R.</i> , 81 Tenn. 507 (1884).	75
<i>Petermann v. International Brotherhood of Teamsters</i> , 344 P.2d 25 (Cal. App. 1959).	76
<i>Printing Pressmen, No. 447 v. Pride Papers-Aaronson Bros. Paper Corp.</i> , 75 L.R.R.M. 2185, <i>aff'd</i> , 445 F.2d 361 (2d Cir. 1971).	110
<i>Retail Store Employees Local 954 v. Lane's of Findlay, Inc.</i> , 260 F. Supp. 655 (N.D. Ohio 1966).	110
<i>Royal Typewriter Co. v. NLRB</i> , 533 F.2d 1030 (8th Cir. 1976).	85
<i>Southport Petroleum Co. v. NLRB</i> , 315 U.S. 100 (1942).	107
<i>Teleprompter Corp. v. NLRB</i> , 570 F.2d 4 (1st Cir. 1977).	90
<i>Textile Workers v. Lincoln Mills</i> , 353 U.S. 448 (1957).	110
<i>Timken Roller Bearing Co. v. NLRB</i> , 325 F.2d 746 (6th Cir. 1963), <i>cert. denied</i> , 376 U.S. 971 (1964).	90
<i>Toussaint v. Blue Cross & Blue Shield of Michigan</i> , 408 Mich. 579, 292 N.W.2d 880 (1980).	77
<i>Town and Country Manufacturing Co.</i> , 136 NLRB 1022 (1962), <i>enforced</i> , 316 F.2d 846 (5th Cir. 1963).	93
<i>Truck Drivers Local 807, Int'l Bhd. of Teamsters v. Carey</i>	

<i>Transportation, Inc.</i> , 816 F.2d 82 (2d Cir. 1987).	80
<i>United Auto Workers v. NLRB</i> , 470 F.2d 422 (D.C. Cir. 1972).	85
<i>United Furniture Workers v. NLRB</i> , 388 F.2d 880 (4th Cir. 1967).	90
<i>United Steelworkers v. American Mfg. Co.</i> , 363 U.S. 564 (1960).	110
<i>United Steelworkers v. Reliance Universal, Inc.</i> , 335 F.2d 891 (3d Cir. 1964).	110
<i>United Steelworkers v. Warrior and Gulf Navigation Co.</i> , 363 U.S. 574 (1960).	109,110
<i>Vegelahn v. Gunter</i> , 44 N.E. 1077 (1896).	47
<i>Wheeling Pittsburgh Corp. v. United Steel Workers of America</i> , 791 F.2d 1074 (3d Cir. 1986).	80
<i>White v. NLRB</i> , 255 F.2d 564 (5th Cir. 1958).	86,231

UNITED KINGDOM

<i>Angus Jowett & Co. v. NUTGW</i> , [1985] I.R.L.R. 326 (E.A.T.).	173
<i>Berriman v. Delabole Slate Ltd.</i> , [1985] I.C.R. 546 (E.A.T.); [1985] I.C.R. 546 (C.A.).	62,145
<i>Bessenden Properties Ltd. v. Corness</i> , [1973] I.R.L.R. 365 (N.I.R.C.) (upheld by the Court of Appeal [1974] I.R.L.R. 338 (C.A.)).	151
<i>Brook Lane Finance v. Bradley</i> , [1988] I.R.L.R. 283 (E.A.T.).	138
<i>Burdett Coutts v. Hertfordshire CC</i> , [1984] I.R.L.R. 91 (Q.B.).	164
<i>Chapman v. Goonvean and Rostowrack China Clay Co. Ltd.</i> , [1973] I.C.R. 310 (C.A.).	150
<i>Civil Service Union v. Central Arbitration Committee</i> , [1980] I.R.L.R. 274 (Q.B.).	167
<i>Daily Telegraph Ltd. and Institute of Journalists</i> , CAC Award No. 78/353.	167
<i>Expro Services Ltd. v. Smith</i> , [1991] I.R.L.R. 156 (E.A.T.).	139
<i>Forth Estuary Engineering v. Litster</i> , [1988] I.R.L.R. 289 (C.A.).	143
<i>Hadden v. University of Dundee Students Association</i> , [1985] I.R.L.R. 449 (E.A.T.).	138,139

<i>Hamish Armour (Receiver of Barry Staines Ltd.) v. ASTMS</i> , [1979] I.R.L.R. 24 (E.A.T.).	174
<i>Hindes v. Supershine Ltd.</i> , [1979] I.R.L.R. 343 (E.A.T.).	151
<i>Hindle v. Percival Boats Ltd.</i> , [1969] 1 All E.R. 836 (C.A.).	151
<i>Hollister v. N.F.U.</i> , [1979] I.C.R. 542 (C.A.).	53
<i>Institution of Professional Servants v. Secretary of State for Defence</i> , [1987] I.R.L.R. 373 (Ch. Div'l Ct.).	176
<i>Johnson v. Nottinghamshire Combined Police Authority</i> , [1974] I.C.R. 170 (C.A.).	149,150
<i>Jones v. Associated Tunnelling Co. Ltd.</i> , [1981] I.R.L.R. 477 (E.A.T.).	149
<i>Joshua Wilson & Bros. Ltd. v. USDAW</i> , [1978] I.R.L.R. 120 (E.A.T.).	172
<i>Kapur v. Shields</i> , [1976] 1 All E.R. 873 (Q.B.). (fn. 179SA,)	215
<i>Lesney Products Ltd. v. Nolan</i> , [1977] I.C.R. 235 (C.A.).	149
<i>Litster v. Forth Dry Dock and Engineering Company</i> , [1989] I.C.R. 341 (H.L.); [1989] I.R.L.R. 161 (H.L.).	143,144,159,177
<i>Lloyd v. Brassey</i> , [1969] 2 Q.B. 98 (C.A.); [1969] 1 All E.R.382 (C.A.).	138,218
<i>Melon v. Hector Powe Ltd.</i> , [1981] I.C.R. 43 (H.L.); [1980] I.R.L.R. 477 (H.L.).	138,184
<i>Murphy v. Epsom College</i> , [1985] I.R.L.R. 80 (C.A.).	149
<i>Newns v. British Airways plc</i> , [1992] I.R.L.R. 575 (C.A.).	119
<i>Nokes v. Doncaster Amalgamated Collieries Ltd.</i> , [1940] App. Cas. 1014 (H.L.).	118,132,180
<i>North Riding Garages v. Butterwick</i> , [1967] 2 Q.B. 56 (Div'l Ct.).	149,150
<i>NUGSAT v. Albury Bros. Ltd.</i> , [1977] I.R.L.R. 173 (E.A.T.); [1978] I.R.L.R. 504 (C.A.).	172
<i>O'Hare v. Rotaprint Ltd.</i> , [1980] I.C.R. 94 (E.A.T.).	150
<i>R. v. Henn</i> , [1981] App. Cas. 850 (H.L.).	142
<i>R. v. Central Arbitration Committee ex parte BTP Tioxide Ltd.</i> , [1982] I.R.L.R. 60 (Q.B.).	166
<i>Robert Seligman Corp v. Baker</i> , [1983] I.C.R. 770 (E.A.T.).	138,139

<i>Secretary of State for Employment v. Spence</i> , [1986] I.R.L.R. 248 (C.A.); [1986] I.C.R. 651 (C.A.).	119,143
<i>Spillers-French (Holdings) Ltd. v. USDAW</i> , [1980] I.C.R. 31 (E.A.T.).	170
<i>Stirling v. Dietsmann Management Systems Ltd.</i> , [1991] I.R.L.R. 368 (E.A.T.).	139
<i>TGWU v. Ledbury Preserves (1928) Ltd.</i> , [1986] I.R.L.R. 492 (E.A.T.).	171
<i>The Bakers' Union v. Clarks of Hove Ltd.</i> , [1978] I.R.L.R. 366 (C.A.).	173
<i>USDAW v. Leancut Bacon Ltd.</i> , [1981] I.R.L.R. 295 (E.A.T.).	174
<i>USDAW v. Sketchley Ltd.</i> , [1981] I.R.L.R. 291 (E.A.T.).	172
<i>Vaux and Associated Breweries v. Ward</i> , [1968] 112 Sol. J. 761 (Div'l Ct.); [1969] 113 Sol. J. 920 (Div'l Ct.).	149
<i>Webb v. EMO (Air Cargo) UK Ltd.</i> , [1993] I.R.L.R. 27 (H.L.).	159,177
<i>Wheeler v. Patel</i> , [1987] I.C.R. 631 (E.A.T.).	143,145
<i>Williams v. Compair Maxam Ltd.</i> , [1982] I.R.L.R. 83 (E.A.T.).	151
<i>Woodcock v. Friends School of Wigton</i> , [1987] I.R.L.R. 98 (C.A.).	139
<i>Woodhouse v. Peter Brotherhood Ltd.</i> , [1972] I.C.R. 186 (C.A.).	184

EUROPEAN COMMUNITY

<i>Abels v. Bestuur van de Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie</i> , [1985] E.C.R. 469 (E.C.J.).	61-64,138,142,154-156
<i>Arie Botzen v. Rotterdamsche Droogdok Maatschappij BV</i> , [1985] E.C.R. 519 (E.C.J.).	61,62,126,155
<i>BNIC v. Clair</i> , [1985] E.C.R. 391 (E.C.J.).	128
<i>BRT v. SABAM</i> , [1974] E.C.R. 313 (E.C.J.).	128
<i>D'Urso v. Ercole Marelli Elettromeccanica Generale SpA</i> , [1992] I.R.L.R. 136 (E.C.J.).	62,142,155
<i>Dr Sophie Redmond Stichting v. Bartol</i> , [1992] I.R.L.R. 366 (E.C.J.).	127,128,141,142
<i>Foreningen af Arbejdsledere i Danmark v. A/S Danmols Inventar</i> , [1985] E.C.R. 2639 (E.C.J.).	61,62,124,125,130,131,155

<i>Foreningen af Arbejdsledere i Danmark v. Daddy's Dance Hall A/S</i> , [1988] E.C.R. 739 (E.C.J.); [1989] 2 C.M.L.R. 517 (E.C.J.).	59,124,126
<i>Harry Berg and Johannes Theodorus Maria Busschers v. Ivo Marten Besselsen</i> , [1989] 3 C.M.L.R. 817 (E.C.J.).	126,132,133,138,142
<i>Harz v. Deutsche Tradax</i> , [1984] E.C.R. 1921 (E.C.J.).	174
<i>Industriebond FNV v. The Netherlands</i> , [1985] E.C.R. 511 (E.C.J.).	61,62,154
<i>Jozef Maria Antonius Spijkers v. Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV</i> , [1986] E.C.R. 1119 (E.C.J.); [1986] 2 C.M.L.R. 296 (E.C.J.).	126,128,142
<i>Katsikas v. Angelos Konstantinidis</i> , [1993] I.R.L.R. 179 (E.C.J.).	132,142,152
<i>Knud Wendelboe v. L.J. Music ApS</i> , [1985] E.C.R. 457 (E.C.J.).	131
<i>Landsorganisationen i Danmark for Tjenerforbundet i Danmark v. Ny Molle Kro</i> , [1987] E.C.R. 11 (E.C.J.).	126,135
<i>Marleasing SA v. La Comercial Internacional de Alimentacion SA</i> , [1992] 1 C.M.L.R. 305 (E.C.J.).	144,159,177
<i>P. Bork International A/S v. Foreningen af Arbejdsledere i Danmark</i> , [1989] I.R.L.R. 41 (E.C.J.).	61,126,131,136,144
<i>Rask and Christensen v. ISS Kantineservice A/S</i> , [1993] I.R.L.R. 133 (E.C.J.).	124,127,128,129,139,142,177
<i>Von Colson v. Land Nord-Rhein-Westphalia</i> , [1984] E.C.R. 1891 (E.C.J.).	174
<i>Wendelboe v. LJ Music Aps</i> , [1985] E.C.R. 457 (E.C.J.).	125

SOUTH AFRICA

<i>Amalgamated Clothing & Textile Workers Union of SA v. SBH Cotton Mills (Pty.) Ltd.</i> , (1988) 9 I.L.J. 1026 (I.C.).	224,231
<i>Anderson v. Foseco (Pty.) Ltd.</i> , (1993) 2 L.C.D. 40 (I.C.).	222
<i>Aureli v. Sopex Importers and Exporters (Pty.) Ltd.</i> , (1993) 2 L.C.D. 296 (I.C.).	212
<i>BCAWU v. Johnson Tiles</i> , (1985) 6 I.L.J. 210 (I.C.).	42,202
<i>BCAWU v. Masterbilt C.C.</i> , (1987) 8 I.L.J. 670 (I.C.).	211,224,227,230
<i>BHT Water Treatment (Pty.) Ltd. v. Maritz N.O.</i> , (1993) 2 L.C.D. 184 (L.A.C.).	187

<i>Bissessor v. Beastores t/a Game Discount World</i> , (1986) 7 I.L.J. 334 (I.C.).	194,203
<i>Bleazard v. Argus Printing & Publishing Co. Ltd.</i> , (1983) 4 I.L.J. 60 (I.C.).	224
<i>Borg-Warner SA v. NAAWU</i> , (1991) 12 I.L.J. 549 (L.A.C.).	187,227
<i>Bryant & Flanagan (Pty.) Ltd. v. Muller</i> , 1977 (1) S.A. 800 (N.).	191
<i>Burmeister v. Crusader Life Assurance Corporation Ltd.</i> , (1993) 14 I.L.J. 1504 (I.C.).	226
<i>Buthelezi v. Labour for Africa</i> , (1991) 12 I.L.J. 588 (I.C.).	203
<i>CCAWU of SA v. Status Hotel</i> , (1990) 11 I.L.J. 167 (I.C.).	220
<i>CCAWU of SA v. George's Cafe</i> , Case No NH 11/2/2617 (unreported).	213,215
<i>Cele v. Bester Homes</i> , (1990) 11 I.L.J. 516 (I.C.).	216,218,219,220
<i>Clark v. Denny</i> , 1884 E.D.C. 300.	189
<i>Cohen N.O. v. Verwoerdburg Town Council</i> , 1983 (1) S.A. 334 (A.D.).	191
<i>Consolidated Frame Cotton Corporation Ltd. v. The President, Industrial Court</i> , (1986) 7 I.L.J. 489 (A.D.).	42,178,209
<i>CSFWU v. Aircondi Refrigeration</i> , (1990) 11 I.L.J. 532 (I.C.).	208,209,216
<i>CWIU v. Indian Ocean Fertilizers</i> , (1988) 9 I.L.J. 1092 (I.C.).	192
<i>CWIU v. Sopelog</i> , (1993) 2 L.C.D. 45 (I.C.).	223
<i>Davie v. Punchline Columbia Training Ltd.</i> , (1993) 2 L.C.D. 299 (I.C.).	212
<i>De Vries v. Lanzerac Hotel</i> , (1993) 14 I.L.J. 1460 (L.A.C.).	185
<i>Durban Integrated Municipal Employees Society v. Tongaat Town Board</i> , (1993) 2 L.C.D. 54 (I.C.).	223
<i>E.M. Mdalose v. B.A.C. Services C.C.</i> , NHN 11/2/1603 (unreported).	220
<i>Ellerine Holdings Ltd. v. Du Randt</i> , (1992) 13 I.L.J. 611 (L.A.C.).	211
<i>Erasmus v. Pentamed Investments (Pty.) Ltd.</i> , 1982 (1) S.A. 178 (W).	192
<i>FAWU v. Ameens Food Products & Butchery</i> , (1988) 9 I.L.J. 659 (I.C.).	211
<i>FAWU v. Kellogg SA (Pty.) Ltd.</i> , (1993) 14 I.L.J. 406 (I.C.).	216

<i>FAWU v. Spekenham Supreme</i> , (1988) 9 I.L.J. 628 (I.C.).	201,204
<i>FBWU v. Transvaal Atlas Wholesale Meat Distributors</i> , (1987) 8 I.L.J. 335 (I.C.).	203
<i>Ferodo (Pty.) Ltd. v. De Ruiter</i> , (1993) 2 L.C.D. 284 (L.A.C.).	216
<i>FGWU v. Sundays River Citrus Co-operative Company Ltd.</i> , (1993) 2 L.C.D. 56 (I.C.).	204
<i>Gumede v. Richdens t/a Richdens Foodliner</i> , (1984) 5 I.L.J. 84 (I.C.).	179
<i>GWIU v. Scottford Mills (Pty.) Ltd.</i> , (1986) 7 I.L.J. 45 (I.C.).	224
<i>GWU v. Dorbyl Marine (Pty.) Ltd.</i> , (1985) 6 I.L.J. 52 (I.C.).	41,211
<i>Hadebe v. Romatex Industrials Ltd.</i> , (1986) 7 I.L.J. 726 (I.C.).	31,211,212,226
<i>Hart v. Pinetown Drive-In Cinema (Pty.) Ltd.</i> , 1972 (1) S.A. 464 (D.).	192
<i>Hlongwane v. Plastix (Pty.) Ltd.</i> , (1990) 11 I.L.J. 171 (I.C.).	209,220
<i>Hoogenoeg Andolusite (Pty.) Ltd. v. NUM (1)</i> , (1992) 13 I.L.J. 87 (L.A.C.).	229
<i>Human v. Workmen's Compensation Commissioner</i> , 1956 (2) S.A. 461 (T.).	199
<i>Imperial Cold Storage & Supply Co. Ltd. v. Field</i> , (1993) 14 I.L.J. 1221 (L.A.C.).	220
<i>Jacob v. Prebuilt Products</i> (1988) 9 I.L.J. 1100 (I.C.).	218,222
<i>Johannesburg Municipality v. O'Sullivan</i> , 1923 A.D. 201.	180
<i>Karbusicky v. Anglo American Corporation of SA Ltd.</i> , (1993) 2 L.C.D. 63 (I.C.); (1993) 14 I.L.J. 166 (I.C.).	212,223
<i>Kebeni v. Cementile Products (Ciskei) (Pty.) Ltd.</i> , (1987) 8 I.L.J. 442 (I.C.).	211,225,228
<i>Larcombe v. Natal Nylon Industries, Pietermaritzburg</i> , (1986) 7 I.L.J. 326 (I.C.).	194
<i>Lathe v. Impala Holiday Flats</i> , (1993) 14 I.L.J. 1074 (I.C.).	179,182,185,227,229,232
<i>Luthuli v. Flortime</i> , (1988) 9 I.L.J. 287 (I.C.).	203
<i>Macsteel (Pty.) Ltd. v. NUMSA</i> , (1990) 11 I.L.J. 995 (L.A.C.).	203
<i>Marievale Consolidated Mines v. President, Industrial Court</i> , (1986) 7 I.L.J. 152 (T.).	203
<i>MAWU v. Hart</i> , (1985) 6 I.L.J. 478 (I.C.).	42,203

<i>MAWU v. Natal Die Castings Co.</i> , (1986) 7 I.L.J. 520 (I.C.).	197,198,203,207
<i>MAWU v. Stobar Reinforcing (Pty.) Ltd.</i> , (1983) 4 I.L.J. 84 (I.C.).	41,203
<i>MAWU v. Transvaal Pressed Nuts, Bolts & Rivets</i> , (1986) 7 I.L.J. 703 (I.C.); (1988) 9 I.L.J. 696 (I.C.).	203,224
<i>Mclaughlin v. GKN Mills</i> , (1986) 7 I.L.J. 721 (I.C.).	226
<i>Media Workers Association of SA v. The Press Corporation of SA Ltd.</i> , (1992) 13 I.L.J. 1391 (A.D.).	197,199
<i>Memela v. Super-Care Cleaning (Pty.) Ltd.</i> , (1992) 13 I.L.J. 172 (I.C.).	222
<i>Meyi v. Ovcon</i> , (1988) 9 I.L.J. 672 (I.C.).	215
<i>Mkhize v. Kingsleigh Lodge</i> , (1989) 10 I.L.J. 944 (I.C.).	216
<i>Mobius Group (Pty.) Ltd. v. Corry</i> , (1993) 2 L.C.D. 193 (L.A.C.).	216
<i>Mohamedy's v. CCAWU of SA</i> , (1993) 2 L.C.D. 34 (L.A.C.).	214
<i>Moosa v. Mavjee Bhawan (Pty.) Ltd.</i> , 1967 (3) S.A. 131 (T.).	192
<i>Moulded Components and Rotomoulding SA (Pty.) Ltd. v. Coucoukrais</i> , 1979 (2) S.A. 457 (W.).	208
<i>Muehlendorf v. Rand Steam Laundries</i> , 1945 T.P.D. 317.	205
<i>MWU v. African Products</i> , (1987) 8 I.L.J. 401 (I.C.).	203
<i>MWU v. East Rand Gold & Uranium Co. Ltd.</i> , (1990) 11 I.L.J. 1070 (I.C.).	42
<i>NAAWU v. Pretoria Precision Castings</i> , (1985) 6 I.L.J. 369 (I.C.).	200
<i>Natal Die Casting v. President, Industrial Court</i> , (1987) 8 I.L.J. 245 (D.).	203
<i>National Union of Leather Workers v. Olympic Footwear - A division of Olympic Flair (Pty.) Ltd.</i> , (1993) 2 L.C.D. 313 (I.C.).	212
<i>NBAWU v. BB Cereals (Pty.) Ltd.</i> , (1989) 10 I.L.J. 870 (I.C.).	42
<i>NEHAWU v. Director-General of Agriculture</i> , (1993) 14 I.L.J. 1488 (I.C.).	211
<i>Ngiba v. Van Dyck Carpets</i> , (1988) 9 I.L.J. 453 (I.C.).	203
<i>Ntsaba v. Eastern Province Textiles (Pty.) Ltd.</i> , (1987) 8 I.L.J. 470 (I.C.).	203,224
<i>Ntuli v. Hazelmores Group t/a Musgrave Nursing Home</i> , (1988) 9 I.L.J. 709 (I.C.).	31,180-184,212,219,222,227,228

<i>NUM v. Buffelsfontein Gold Mining Co.</i> , (1991) 12 I.L.J. 346 (I.C.).	71
<i>NUM v. Marievale Consolidated Mines</i> , (1986) 7 I.L.J. 123 (I.C.).	203
<i>NUMSA v. Atlantis Diesel Engines (Pty.) Ltd.</i> , (1993) 14 I.L.J. 642 (L.A.C.).	212,214,217,225,226,227
<i>NUMSA v. Metkor Industries (Pty.) Ltd.</i> , (1990) 11 I.L.J. 1116 (I.C.).	211,214,226,227,229
<i>NUMSA v. Spinmet (Pty.) Ltd.</i> , (1993) 2 L.C.D. 36 (L.A.C.).	188
<i>NUMSA v. Steeleedale Reinforcing and Trading Co.</i> , (1988) 9 I.L.J. 674 (I.C.).	231
<i>NUTW v. Braitex (Pty.) Ltd.</i> , (1987) 8 I.L.J. 794 (I.C.).	208,211,223
<i>NUTW v. Cape Produce Co.</i> , (1986) 7 I.L.J. 749 (I.C.).	203
<i>NUTW v. Sea Gift Surfware Manufacturers</i> , (1985) 6 I.L.J. 101 (I.C.).	210
<i>NUTW v. Stag Packings (Pty.) Ltd.</i> , 1982 (4) S.A. 151 (T.).	233
<i>OK Bazaars v. Madeley N.O.</i> , 1943 T.P.D. 392.	205
<i>Paper, Printing, Wood & Allied Workers Union v. Delma (Pty.) Ltd.</i> , (1989) 10 I.L.J. 424 (I.C.).	210
<i>Paper, Printing, Wood & Allied Workers Union v. Kaycraft (Pty.) Ltd.</i> , (1989) 10 I.L.J. 272 (I.C.).	211,223
<i>Paper, Printing, Wood & Allied Workers Union v. Lane N.O. as Trustee of Cape Pallet C.C. (in liquidation)</i> , (1993) 14 I.L.J. 1366 (I.C.).	185
<i>R. v. Hildick-Smith</i> , 1924 T.P.D. 69.	199
<i>Raad van Mynvakbonde v. Harmony Goudmynmaatskappy Bpk.</i> , (1993) 14 I.L.J. 183 (I.C.).	199
<i>Ramolesane v. Andrew Mentis</i> , (1991) 12 I.L.J. 329 (L.A.C.).	42
<i>Rand Air (Pty.) Ltd. v. Ray Bester Investments (Pty.) Ltd.</i> , 1985 (2) S.A. 345 (W.).	192
<i>Rosenbach & Co. (Pty.) Ltd. v. Singh's Bazaars (Pty.) Ltd.</i> , 1962 (4) S.A. 593 (D.).	191
<i>Roshanlall v. Design Three</i> , (1989) 10 I.L.J. 1162 (I.C.).	185
<i>RTEAWU v. Tedalex (Pty.) Ltd.</i> , (1990) 11 I.L.J. 1272 (I.C.).	42
<i>SAAME v. Minister of Labour</i> , 1948 (1) S.A. 528 (T.).	196
<i>SA Association of Municipal Employees v. Pretoria City Council</i> , 1948 (1) S.A. 11	

(T.).	42
<i>SAAWU v. Contract Installations (Pty.) Ltd.</i> , (1988) 9 I.L.J. 112 (I.C.).	185
<i>SA Boilermakers, Iron & Steelworkers, Shipbuilders & Welders Society v. SA Cutlery (Pty.) Ltd.</i> , (1988) 9 I.L.J. 1106 (I.C.).	190
<i>SACCAWU v. Checkers SA Ltd.</i> , (1992) 13 I.L.J. 411 (I.C.).	229
<i>SACCAWU v. Minister of Manpower</i> , (1993) 14 I.L.J. 909 (T.).	178
<i>SACCAWU v. Southern Sun Hotel Corp. (Pty.) Ltd.</i> , (1992) 13 I.L.J. 132 (I.C.).	42
<i>SACCAWU v. Steers Fast Food</i> , (1993) 2 L.C.D. 125 (L.A.C.).	182
<i>SACTWU v. Belcanto Nominees No. 2 Ltd. t/a Lansdowne Textile Industries</i> , (1993) 2 L.C.D. 87 (I.C.).	189
<i>SACTWU v. Jatex SA (Pty.) Ltd.</i> , (1992) 13 I.L.J. 1252 (I.C.).	216
<i>SACTWU v. Maroc Carpets & Textile Mills (Pty.) Ltd.</i> , (1990) 11 I.L.J. 1101 (I.C.).	42
<i>SACTWU v. SA Clothing Manufacturers</i> , (1991) 12 I.L.J. 1066 (I.C.).	187
<i>SACWU v. Chemco Laboratories (Pty.) Ltd. & Delta Distributors (Pty.) Ltd.</i> , Unpublished judgement of the Industrial Court, Case No. NH 11/2/1688, 23-25 October 1989.	185
<i>SACWU v. Control Chemicals</i> , (1988) 9 I.L.J. 606 (I.C.).	203
<i>SACWU v. Toiletpak Manufacturers (Pty.) Ltd.</i> , (1988) 9 I.L.J. 295 (I.C.).	185,212,223
<i>SADWU v. The Master Cutters' Association of SA</i> , (1982) 3 I.L.J. 87 (I.C.).	178
<i>SA Municipal Workers Union v. Ibhayi City Council</i> , (1993) 2 L.C.D. 94 (I.C.).	223
<i>SA Society of Bank Officials v. Standard Bank of SA Ltd.</i> , (1993) 14 I.L.J. 706 (I.C.).	204
<i>Sentraal-Wes Ko-op (Bpk.) v. FAWU</i> , (1990) 11 I.L.J. 977 (L.A.C.).	42,203
<i>Seven Abel C.C. t/a The Crest Hotel v. HRWU</i> , (1990) 11 I.L.J. 504 (L.A.C.).	216
<i>Shezi v. Consolidated Frame Cotton Corporation Ltd.</i> , (1984) 5 I.L.J. 3 (I.C.).	41,215
<i>Simelane v. Audell Metal Products (Pty.) Ltd.</i> , (1987) 8 I.L.J. 438 (I.C.).	210,223
<i>Stellenbosch Farmers' Winery (Pty.) Ltd. v. National Union of Wine, Spirits & Allied Workers</i> , (1992) 13 I.L.J. 1182 (L.A.C.).	221
<i>Stewart Wrightson (Pty.) Ltd. v. Thorpe</i> , 1977 (2) S.A. 943 (A.).	233

<i>TATU v. Spoornet</i> , (1993) 2 L.C.D. 323 (I.C.).	212
<i>TGWU v. Action Machine Moving & Warehousing (Pty.) Ltd.</i> , (1992) 13 I.L.J. 646 (I.C.).	221
<i>TGWU v. City Council of the City of Durban</i> , (1991) 12 I.L.J. 156 (I.C.).	208
<i>TGWU v. Putco Ltd.</i> , (1987) 8 I.L.J. 801 (I.C.).	224,230
<i>TGWU, Wilson Nene v. Durban Transport Management Board</i> , NHN 11/2/2038 (unreported).	209
<i>Themba v. Nico van Rooyen Taksidermie</i> , (1984) 5 I.L.J. 245 (I.C.).	203
<i>The Media Workers Association of SA v. Facts Investors Guide (Pty.) Ltd.</i> , (1986) 7 I.L.J. 313 (I.C.).	184
<i>Trident Steel (Pty.) Ltd. v. John N.O.</i> , (1987) 8 I.L.J. 27 (W.L.D.).	42
<i>UAMAWU v. Fodens</i> , (1983) 4 I.L.J. 212 (I.C.).	197,202,215,224
<i>UAMAWU v. SGI Caps Industries</i> , (1986) 7 I.L.J. 405 (I.C.).	203
<i>Van Breda v. Jacobs</i> , 1921 A.D. 330.	219
<i>Veldspun (Pty.) Ltd. v. ACTWUSA</i> , (1992) 13 I.L.J. 41 (E.).	42
<i>Ward v. Sentrachem Ltd.</i> , (1992) 13 I.L.J. 252 (I.C.).	228
<i>Woodley v. Guardian Assurance Co. of SA Ltd.</i> , 1976 (1) S.A. 758 (W.).	191
<i>Young v. Lifegro Assurance</i> , (1990) 11 I.L.J. 1127 (I.C.).	187,214,218,219,220,221
<i>Zipp v. Trac X Spares</i> , (1989) 10 I.L.J. 1137 (I.C.); (1990) 11 ILJ 408 (IC).	190
<i>Zuke v. Minister of Manpower</i> , (1985) 6 I.L.J. 193 (D.).	196

TABLE OF LEGISLATION

USA STATUTES

National Labor Relations Act of 1935, 29 U.S.C. secs. 151-69 (1982)

NLRA sec. 1, 29 U.S.C. sec. 151	82,102
NLRA sec. 2(5), 29 U.S.C. sec. 152(5)	72
NLRA sec. 7, 29 U.S.C. sec. 157	99
NLRA sec. 8(a)(1), 29 U.S.C. sec. 158(a)(1)	95,110,114
NLRA sec. 8(a)(2), 29 U.S.C. sec. 158(a)(2)	72
NLRA sec. 8(a)(3), 29 U.S.C. sec. 158(a)(3)	95,114
NLRA sec. 8(a)(5), 29 U.S.C. sec. 158(a)(5)	47,56,81,84,95,106,110
NLRA sec. 8(d), 29 U.S.C. sec. 158(d)	47,56,80,81,82,84,106

Labor-Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. sec. 141 et seq. (1982)

84

LMRA sec. 301, 29 U.S.C. sec. 185	109,113
-----------------------------------	---------

Civil Rights Act of 1964, 42 U.S.C. sec. 2000e (1976)

75

Freedom of Information Act of 1966 (portion of Administrative Procedure Act of 1946), 5 U.S.C. sec. 551 et seq. (1976)

91

Government Organization and Employees, 5 U.S.C. sec. 7512(a) (1976)

75

Bankruptcy Code, 11 U.S.C (1982)

sec. 101 (Supp. III 1985)	78
sec. 365	79
sec. 365	79
sec. 507(a)	78
sec. 507(b)	79
sec. 1113 (Supp. III 1985)	79,80
sec. 1113(e)	80
sec. 1129	79
Chapter 7	78,79
Chapter 11	78

Employee Retirement Income Security Act (ERISA) of 1978 sec. 101, 29 U.S.C. sec. 1001 (1982)

79

Worker Adjustment and Retraining Notification Act (WARN Act) of 1988, 29 U.S.C. sec. 2101 et seq. (1988)

WARN Act sec. 3(b), 29 U.S.C sec. 2102	105
--	-----

UK STATUTES

Companies Act 1948

sec. 319	153
----------	-----

Contracts of Employment Act 1963 161

Redundancy Payments Act 1965 29,148,153,161,169

Equal Pay Act 1970 161

Industrial Relations Act 1971 29,161

sec. 56	166
---------	-----

European Communities Act 1972

sec. 2(2)	137,170
-----------	---------

Trade Union and Labour Relations Act 1974

sec. 1(1)	161
sec. 29(1)	163

Employment Protection Act 1975 161,171

sec. 8	171
sec. 17(1)(b)	166,167
sec. 17(2)	38,162
sec. 18(1)	167
sec. 18(2)(a)	167
sec. 18(2)(b)	167
sec. 99(1)	38,162
sec. 99(7)	171
sec. 99(8)	173
secs. 99-107	37,152,169
sec. 126(1)	163,171

Employment Protection (Consolidation) Act 1978 161

sec. 31(a)	36
sec. 57	151
sec. 57(1)	144,145
sec. 57(2)	144
sec. 57(3)	144
sec. 59	151
sec. 68	54

sec. 81(2) (Part VI)	148
sec. 81(2)(b)	149
sec. 82(5)	151
sec. 94	152
sec. 96	147
secs. 106(1)(b) & (5)(c)	153
sec. 121	153
sec. 122	153
Part V	29
Part VI	29,148
Employment Act 1980	38,161,162,171
sec. 13	36
Employment Act 1982	161
sec. 18	163
Social Security and Housing Benefits Act 1982	36
Social Security Act 1985	36
Wages Act 1986	147
Insolvency Act 1986	
Part II	157
Employment Act 1989	147
Trade Union and Labour Relations (Consolidation) Act 1992	
secs. 178, 218.	51
Trade Union Reform and Employment Rights Act 1993	30,141,170
sec. 32(2)	139
sec. 32(3)	137,138
sec. 32(4)(c)	152
sec. 32(6)	170,174,176
sec. 32(7)(a)	174
sec. 32(7)(b)	174
sec. 33(2)(a)	176
sec. 33(2)(b)	170,171
sec. 33(2)(c)	174
sec. 33(3)	174
sec. 33(5)	169

UK DELEGATED LEGISLATION

Transfer of Undertakings (Protection of Employment) Regulations 1981 (S.I. 1981 No. 1794, as amended in minor respects by S.I. 1987, No. 442)	36,37,137,170
Regulation 2(1)	139
Regulations 3(1) and 3(4)	137
Regulation 4	158
Regulation 5(1)	152
Regulation 5(3)	143
Regulation 8(1)	144
Regulation 8(2)	144
Regulation 10	38,162
Regulation 10(2)	175
Regulation 10(5)	171,174
Regulation 10(7)	173
Regulation 11	38,162
Regulation 11(11)	174
Equal Pay (Amendment) Regulation 1983 (S.I. 1983 No. 1794)	36

EUROPEAN COMMUNITY

**Treaty Establishing the European Economic Community,
Rome, 25 March 1957 (Belgium, Germany, France, Italy,
Luxembourg, The Netherlands)**

art. 85(1)	128
First social action programme adopted by the Council on June 27, 1972, O.J. Eur. Comm. (No. C 23)(1972)	122
Second social action programme adopted by the Council on January 21, 1974, O.J. Eur. Comm. (No. C 13)(1974)	122
Council Directive 75/117/EEC (Equal Pay)(O.J. Eur. Comm. (No. L 45) 19 (1975))	124
Council Directive 75/129/EEC (Collective Redundancies) (O.J. Eur. Comm. (No. L 48) 29 (1975))	29,37,124,168,170
Art. 1	149
Amended by: Council Directive 92/56/EEC (O.J. Eur. Comm. (No. L 245) 3 (1992))	168
Council Directive 76/207/EEC (Equal Treatment)(O.J. Eur. Comm. (No. L 39) 40 (1976)	124

Council Directive 77/187/EEC (Safeguarding Employees' Rights in the Event of Transfers of Undertakings)(O.J. Eur. Comm. (No. L 61) 26 (1977)) 29,37,122,124,129,165,168,170,172

Art. 1(1)	126,139
Art. 2	171
Art. 3(1)	122,129,132
Art. 3(2)	122,135
Art. 4	123,168
Art. 5(1)	135
Art. 6	165,168,171
Art. 6(2)	137,174

Preparatory and related documents:

Draft Directives (COM. No. 74) 351 final (21 June 1974); (COM. No. 75) 429 final (25 July 1975)	172
--	-----

Report of the Committee on Social Affairs and Employment (the Yeats report)(Eur. Parl. Doc. (Com. No. 384) para. 3 (1974))	60
--	----

Opinion of the Economic and Social Committee on the proposed Directive on Safeguarding Employees' Rights in the Event of Transfers of Undertakings 77/187/EEC (O.J. Eur. Comm. (No. C 255) 25 (7 November 1975))	60
---	----

Commission Report to the Council (Adopted on 2 June 1992) on progress with regard to the implementation of Directive 77/187/EEC relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses	30,55,137,140
--	---------------

**Council Directive 80/987/EEC (Protection of Employees in the Event of the Insolvency of their Employer)
(O.J. Eur. Comm. (No. L 283)(1980))** 64,124,154,160

Preparatory documents:

Report of the EEC Commission on protection of employees in the event of the insolvency of their employer (4 Bull. Eur. Comm. 46 (1978) and 10 Bull. Eur. Comm. 17 (1980))	153
--	-----

Proposal for a Directive on the approximation of the
laws of the Member States relating to the protection of
employees in the event of the insolvency of their employer,
O.J. Eur. Comm. (No. C 135)(9 June 1978).

**Draft Directive on company law (O.J. Eur. Comm. (No. C 240)
2 (9 September 1983))** 165

Draft Directive (the "Vredeling Richards" Directive) on employee information and consultation procedures in companies with complex structures such as large national and multinational firms (O.J. Eur. Comm. (No. C 217) 3 (12 August 1983))	165
--	------------

SA STATUTES

Insolvency Act 24 of 1936	192
sec. 38	189,190,191
secs. 97 -102	191
sec. 100(1)(a)	190
sec. 100(2)	190
sec. 100(3)	190
Factories, Machinery & Building Work Act 22 of 1941	201
Black Labour Relations Regulation Act 48 of 1953	70
Labour Relations Act 28 of 1956	39,70,194
sec. 1	31,178,196
sec. 1(1)	195
sec. 17(11)(a)	195,229
sec. 17(11)(f)	195
sec. 17D	195
sec. 18	196,197
sec. 19	197
sec. 21(1)(a)	207
sec. 27(7)	207
sec. 30(1)	207
sec. 34A	70
sec. 35	196,197
sec. 36(1)	196
sec. 43	40,195
sec. 43(1)	195
sec. 43(2)	196
sec. 43(6)	190
sec. 43(7)	190
sec. 46(9)	195,196
sec. 46(9)(d)	196
sec. 48	196
sec. 65	197
sec. 66	197
sec. 78	197
sec. 79	197
Wage Act 5 of 1957	201
Shop and Offices Act 75 of 1964	201

Companies Act 61 of 1973

sec. 339	191
sec. 342(1)	191
sec. 344(e)	191
sec. 344(f)	191
sec. 344(h)	192
sec. 345(1)(a),(b),(c)	191
sec. 346	191
sec. 346(1)(b)	191
sec. 427(2)	193
sec. 430	193
sec. 431	193
sec. 433	193
sec. 433(h)	193

Black Labour Relations Amendment Act 84 of 1977	70
--	-----------

Industrial Conciliation Amendment Act 94 of 1979	31,178
---	---------------

Manpower Training Act 56 of 1981

sec. 22(5)(a)	183
---------------	-----

Labour Relations Amendment Act 57 of 1981	70
--	-----------

Labour Relations Amendment Act 51 of 1982

sec. 8	40
--------	----

Basic Conditions of Employment Act 3 of 1983

sec. 12	183
---------	-----

Labour Relations Amendment Act 83 of 1988	195,205
--	----------------

Labour Relations Amendment Act 9 of 1991	195
---	------------

Public Service Labour Relations Act 102 of 1993	196
--	------------

Basic Conditions of Employment Amendment Act 137 of 1993	196
---	------------

Agricultural Labour Act 147 of 1993	196
--	------------

Constitution of the Republic of South Africa Act 200 of 1993	41
---	-----------

GERMAN STATUTE**Betriebsverfassungsgesetz 1972**

article 112	165
-------------	-----

INTERNATIONAL LABOUR ORGANIZATION

Constitution, 1919, Art. 41	133
-----------------------------	-----

Convention No. 158, 1982 (Termination of Employment)	208
--	-----

Recommendation No. 119, 1963 (Termination of Employment)	78
--	----

Recommendation No. 166, 1982 (Termination of Employment)	208,225
--	---------

CHAPTER 1

INTRODUCTION

Introduction

Mergers and sales of businesses, workplace closures (complete or partial), plant relocations, subcontracting or other company reorganisations can have devastating effects on workers. The erosion of job security and the eradication of collectively bargained protections can leave displaced workers in a vacuum which traditional labour law with its emphasis on voluntarism is less and less able to fill. Conventional labour law has not been able to resolve the basic conflict between the economic demands for restructuring and rationalisation (one of the main consequences of the global economy), and the social demands for workers' protection.

When the UK Government was confronted with the European Community's Directive on the Safeguarding of Employees' Rights in the Event of Transfers of Undertakings,¹ the question regarding the need for legislation to protect workers in the case of business transfers was seriously debated.² Previously, similar questions had emerged with regard to the enactment of the law on unfair dismissal,³ the Redundancy Payments Act,⁴ and some provisions of the European Community's Directive on Collective Redundancies.⁵

In the United States, the minimal protection provided by the law and its shrinking ability to lessen the impact of business reorganisations have compelled unions to develop strategies to deal with the trend of corporate mergers, takeovers,

¹Council Directive 77/187/EEC (O.J. Eur. Comm. (No. L 61) 26 (1977)).

²See Bob Hepple, "Workers' Rights in Mergers and Takeovers: The EEC Proposals", 5 *Indus. L.J.* 197 (1976) and "Council Directive of February 14, 1977, on the approximation of the laws of the Member States, relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses," 6 *Indus. L.J.* 106 (1977); "The Transfer of Undertakings (Protection of Employment) Regulations," 11 *Indus. L.J.* 29 (1982). The UK Government's rather hostile reception of the Acquired Rights Directive is also discussed in P.L. Davies and M.R. Freedland, *Labour Legislation and Public Policy* 577-580 (Oxford 1993).

³The law on unfair dismissal was planned by the Labour Government after the publication of the Donovan Report, *Report of the Royal Commission on Trade Unions and Employers Associations*, para. 545, Cmnd. 3623 (1968) but was enacted by the Conservative Government in 1971 (Industrial Relations Act 1971)(now Part V of the EP(C)A 1978).

⁴Redundancy Payments Act 1965 (now EP(C)A Part VI).

⁵Council Directive 75/129/EEC (O.J. Eur. Comm. (No. L 48) 29 (1975)).

reorganisations and closures.⁶ Given the well documented decline in union membership, it is imperative that such a discussion should extend to workers who are not unionised and to entire communities.

In South Africa a similar discussion has taken place, especially in the context of workers' relationships with employers in a non-racial South Africa, and the future role of collective bargaining in economic reconstruction.⁷

A comparison of the law in the United States, South Africa and the United Kingdom can cast the divergent interests, which become conspicuous during corporate reorganisations, into bold relief, and suggest how those interests can be reconciled. The similarities in the industrial relations systems in the three countries are striking: the major premises in all of them are that employees sell their labour power in a free exchange, that employers exercise ultimate control over the productive processes, and that employees are expected to accept the employers' management and decision-making powers. Business transfers and accompanying business changes are a focal point for the tension between the protection of rights of employees, including their "property rights" in the job and their "right" to meaningful participation, and the interests of management in achieving its economic objectives effectively.

In the UK the acquired rights legislation, derived from the 1974 social action programme of the EC, and perceived by employers and some Governments with much suspicion, disappointed the expectations of those who wanted to see greater job security. However, since 1989 judicial activism in the European Court of Justice has appeared to expand the scope of the EC Directive, and legislative amendments, introduced in the UK after the European Commission had begun infringement proceedings because of the failure of the UK to fulfil its obligations,⁸ also promise to broaden the scope of application of the UK legislation. Although major weaknesses

⁶Labour conferences have included a discussion of the subject of workplace closures and company reorganizations, for example, the AFL-CIO LCC Video Conference (June 23, 1989) and the Twenty Second Teamsters Lawyers Conference, New Orleans, Louisiana (September 19, 1989).

⁷See, e.g., COSATU's publication *Political Economy: South Africa in Crisis* (Johannesburg 1987).

⁸In 1992 the European Commission produced a report criticising aspects of the UK's Regulations. (Commission Report to the Council on progress with regard to the implementation of Directive 77/187/EEC relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, adopted on 2 June 1992.) The UK Government gave an undertaking to amend the law and, in November 1992, introduced the Trade Union Reform and Employment Rights Bill (TURER) into Parliament.

remain, partly because in the UK there is no legislation to support the appointment of workers' representatives, the acquired rights legislation has brought about some change (albeit not radical) in employees' job security and has introduced some curb on the way in which management approaches business reorganisations.

Acceptance of an arbitrary right to "hire and fire" in the USA, leaves employees in most instances with very little job security. Collective organisations have operated under a legal system which gives employers a far-reaching prerogative, and as a result, have not been able to protect employees' employment opportunities. The Courts have restricted bargaining subjects so as to limit the participation of employees in most decisions which involve capital mobility and investments, and which may imperil or destroy the job security of employees.⁹ In such cases an employer is obliged to bargain with a union about the effects of the decision, but this only serves as a palliative to mitigate the harsh consequences to some extent.¹⁰ Under the successorship doctrine an employer who takes over a business may incur an obligation to bargain with a union,¹¹ and under restricted circumstances, to honour some of the provisions of a collective agreement.¹² Yet, such an employer retains an almost unlimited discretion to eliminate employees' jobs.

In South Africa, the introduction of a broad unfair labour practice definition has placed some curbs on the power of an employer to effect individual or mass dismissals.¹³ Moreover, a degree of industrial democracy has been introduced in the form of consultation about fundamental business decisions.¹⁴ But the shackles of the common law restrains legal thought in the case of employees who are faced with a change of employer, and renders job security elusive.¹⁵

The main point that will emerge from the comparison of the way in which the

⁹*Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964) and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

¹⁰See, e.g., *General Motors Corp. v. NLRB*, 470 F.2d 422 (D.C. Cir. 1972).

¹¹*NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

¹²*Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974).

¹³The definition of an unfair labour practice in sec. 1 of the Labour Relations Act was inserted by sec. 1(f) of the Industrial Conciliation Amendment Act 94 of 1979.

¹⁴See, e.g., *Hadebe v. Romatex Industrials Ltd.*, (1986) 7 I.L.J. 726 (I.C.).

¹⁵The leading case is *Ntuli v. Hazelmere Group t/a Musgrave Nursing Home*, (1988) 9 I.L.J. 709 (I.C.).

three countries deal with the phenomenon of structural business changes and the effect of such changes on workers, is that law, even though its effectiveness to bring about major changes in an industrial relations system is limited, can make some difference.

The sections of this chapter following immediately will briefly account the development and current thinking about law and industrial relations in the USA, South Africa and the UK. The values and assumptions which have permeated thinking about the labour market in many industrialised countries, including the UK, USA and South Africa, and which have influenced the law in the area of business transfers, will then be considered. These values and assumptions can best be described by utilising the pluralist model of management-labour relations. Against the background of this model judicial decisions can be analysed for their approach to the relationship between collective bargaining and management control. Moreover, the pluralist model provides a basis for an evaluation and assessment of the scope and function of collective bargaining as well as the extent and form of management control in the workplace.¹⁶

By arguing that collective bargaining has never succeeded in effectively mitigating the power of management over the workforce, pluralist support of voluntarism will be criticised. The reason why voluntarism never really came close to redressing the basic unequal distribution of power stems from a misconception of the role of legal institutions in shaping the labour market and a failure to recognise that law can be a powerful social force responsible for creating the labour market's main characteristics. With the shortcomings of the pluralist model in mind, the argument will be proffered that the law can be used to contribute to equity and efficiency. These goals require a focus for the law broader than unions and collective bargaining. An expanded role for the law involves intervention in labour relations to set standards and lay down procedures for the exercise of managerial prerogative; it entails, specifically, the introduction of the values of liberal society into the workplace, such as rationality, fairness, and respect for individual rights. It will be shown in detail how acquired rights legislation's greatest strength can be in providing a solution to the tension between managerial prerogative and employees' rights through the introduction of certain of these values.

¹⁶See A. Goldsmith, "The Management-Control Collective Bargaining Relationship: Three Models", 24 Osgoode Hall L.J. 775, 776 (1986) (models can have descriptive and normative significance).

Law and industrial relations in the United States

Labour law in the United States, like that in Britain, has been moulded within the "voluntarist" tradition. Unlike Britain, however, American legislation provides support for collective bargaining but at the same time restricts collective bargaining as a means to regulate terms and conditions of employment. Moreover, legislative forms of employment protection are largely lacking. Any suggestions for new forms of legal intervention are usually overruled by concerns to reduce employers' costs, to lower high unemployment and to create greater flexibility with regard to workplace organisation, technology and mobility of workers. As yet, the expression of these concerns has not resulted in clear solutions to the underlying problems, and it is therefore appropriate to look critically at aspects of legalism,¹⁷ its achievements and limitations in the United States, and at policies of flexibility which entail a very limited role for the law in industrial relations.

Initially, American trade unions were committed to legalism, based on the favourable experience during the period of the Wagner Act. The unprecedented membership growth which unions enjoyed at this time was, however, a result not only of legislation but of an exceptional conjunction of events. The whole political and social climate -- Roosevelt's re-election in 1936, the Supreme Court decision in *Jones and Laughlin* which upheld the constitutionality of the Wagner Act, and the relative prosperity of 1937 -- was conducive to unionisation and to counteracting the power of large corporations. During recent decades the context of American labour law has altered fundamentally due to social and legislative changes. Business pressure and public alarm gave rise to the Taft-Hartley and Landrum-Griffin Acts which contained various legal controls outlawing previously legitimate organising practices. Structural changes in the economy have slowed the growth of sectors in which unions were strongest -- transportation, construction and manufacturing -- and have spurred employment growth in industries such as trade, finance and insurance, services and Government. As yet, unions have not been able to establish significant bases in these fast growing areas of the economy.

Legalism has been held in check by Government policies promoting labour

¹⁷"Legalism" is used here in broadly the same sense as "juridification," a term which was defined by Jon Clark in a review as "a process (or processes) by which the state intervenes in areas of social life (industrial relations, education, family, social security, commerce) in ways which limit the autonomy of individuals or groups to determine their own affairs. In the most general terms it is about the relation between state and society, and the balance between their relative influence on the way human beings conduct their lives." (Jon Clark, "The Juridification of Industrial Relations: A Review Article," 14 *Indus. Rel. J.* 69, 71 (1985).)

market flexibility and generally including two strategies: partial abstention by the Government from setting basic labour standards, and encouragement of decentralised collective bargaining.¹⁸ While the first of these techniques is commonly regarded as a close relative of deregulation, the second technique, by contrast, is achieved in the United States through regulation, and was to a large extent implicit in the legal framework established by the Wagner and Taft-Hartley Acts. Decentralised collective bargaining is the norm since an employer's legal duty to bargain is usually located at plant or company level. The duty to bargain has been circumscribed by decisions of the Courts and of the National Labour Relations Board, which restricted coverage of collective agreements by excluding from the employer's duty to bargain subjects like the relocation of plants and resources, the subcontracting of work, and even, in some instances, the introduction of unilateral changes in terms and conditions of employment.¹⁹ Labour standards have been further undermined by the possibility of relocating plants to the southern and western regions of the country which have not been unionised. Workers who are not covered by collective bargaining agreements - and these include more than eighty percent of the workforce -- work under the doctrine of employment at will, without significant federal job protection legislation and with very little legislation of this kind at state level. Workers outside the unionised sectors therefore experience a great deal of job insecurity. Common law approaches used to develop exceptions to the rule of employment at will, do not amount to a systematic repudiation of the doctrine.²⁰

In short, the American system is characterised by a void in minimum employment standards resulting from the absence of social regulation of terms and conditions of employment, and the elimination of collective bargaining in important areas and sectors of the labour market. The general absence of social regulation of terms and conditions of employment has found a striking manifestation in plant closures, relocations and mass economic layoffs. While most industrial democracies have legislation to deal with these phenomena which have occurred with increasing frequency in recent years and caused similar problems everywhere for workers and

¹⁸Simon Deakin, "Legal Change and Labour Market Restructuring in Western Europe and the US," 16 *New Zealand J. Indus. Rel.* 109, 111 (1991).

¹⁹J. Atleson, *Values and Assumptions in American Labor Law* (Amherst, Massachusetts 1983).

²⁰Common law limitations on employment at will include the interpretation of promises of job security as terms of the contract of employment, and a number of public policy exceptions.

their communities, the United States has shown a reluctance to adopt legislation requiring prior notice or consultation, or providing benefits for workers. Only a few state and local laws offer very limited protection to workers.

An important reason for the lack of legislative response to the problems of major economic adjustments, can be found in the ideology of private ownership and property rights which, in the United States, is strongly influenced by notions worked out during the 19th century. This explains the reluctance on the part of the legislature to accept limitations on the "right" of owners of businesses to shut down or relocate for economic reasons, or to require consultation before reaching business decisions. Flexibility is imposed on workers, without affording their representatives an opportunity to be involved in discussions of substantive questions of flexibility.²¹ The benefits of the apparently enhanced flexibility which the American system has achieved are open to question, especially since social divisions have been increased between unionised workers in full-time employment who are covered by collective agreements, and workers in non-unionised sectors. At the lowest end of protection are part-time and temporary workers who have no effective route towards more secure employment. Mobility and adaptability have not been achieved by policies of deregulation which neglect the importance of effective training to provide mobility and, more severely, the devastating effects of unemployment and the spread of poverty.

Ironically, the prevailing ideology, far from aiding businesses, may actually harm both businesses and workers. In an analysis of ideology and national competitiveness in nine countries, Lodge and Vogel pointed out that, in general, countries with a coherent communitarian ideology are coping better with foreign competition than the United States with its highly individualistic free-market ideology.²² For workers and businesses to do better, existing policies based on a seemingly outdated ideology need to be re-evaluated. What is clearly called for is a re-evaluation to facilitate long-term planning for economic health. For the labour movement in the US a role in imaginative planning will demand a vision, not as narrow interests groups, but as associations which seek to improve community lives "with a

²¹ Compare in this regard most of the systems of continental Europe where one technique of enhancing flexibility through collective bargaining has been the involvement of unions and employers' associations with Government in the adoption of laws on the substantive questions of flexibility. See A. Lyon-Caen & L. Mariucci, "The State, Legislative Intervention and Collective Bargaining: A Comparison of Three National Cases," 1 *Int'l J. Comp. Lab. L. & Indus. Rel.* 87-107 (1987).

²² *Ideology and National Competitiveness: An Analysis of Nine Countries* 321 (George C. Lodge & Ezra F. Vogel eds., Boston, Massachusetts 1986).

special concern for those who are powerless as individuals."²³ The role of law in achieving an increase in individual freedom and welfare should be seriously considered.

Law and industrial relations in the UK

In the British voluntary tradition the argument has always been offered that legal regulation should play a secondary role in comparison with voluntary regulation, mainly in the form of collective bargaining between management and trade unions. Traditionally, British law played a limited role with regard to the protection of workers and support of trade unions, in part because trade unions themselves viewed the law as an instrument of the establishment which largely advanced the interests of the powerful and wealthy. This view resulted in a conscious "aversion to legislative intervention" and an "almost passionate belief in the autonomy of industrial forces."²⁴ Collective bargaining in the UK originated and developed without significant legal intervention, unlike the USA where unions only achieved a level of recognition by employers after the implementation of the National Labor Relations Act of 1935. The explanation for the absence of legal mechanisms to require employers to bargain with trade unions was given in terms of the theory of collective laissez-faire, which implied a limited role for the law in the field of industrial relations. To this the British Government has added deregulation as a political slogan even though the facts point to a growth in legal regulation in many areas.²⁵

A trend towards statutory regulation became obvious with the development of statutory employment protection such as the Contracts of Employment Act 1963, the Redundancy Payments Act 1965 and the Industrial Relations Act's provisions on unfair

²³Lawrence E. Rothstein, *Plant Closings: Power, Politics, and Workers* 60 (Dover, Massachusetts 1986).

²⁴Otto Kahn-Freund, "Labour Law" in *Law and Opinion in England in the Twentieth Century* 221, 224 (Morris Ginsberg ed., London 1959).

²⁵Areas affected by legal regulation include those in which the UK had to comply with EEC law such as Transfer of Undertakings (Protection of Employment) Regulations (regulated in the UK by S.I. 1981 No. 1794) and Equal Pay (Amendment) Regulations 1983 (S.I. 1983 No. 1794), but also areas such as statutory sick pay (introduced by the Social Security and Housing Benefits Act 1982 and extended by the Social Security Act 1985), the right to time off work for ante-natal care (EP(C)A sec. 31A, inserted by EA 1980 sec. 13) and occupational pension schemes (Social Security Act 1985).

dismissal.²⁶ These legal changes were the result of an economic and social crisis, characterised by industrial conflict and low productivity. They were aimed at reforming the existing practices of collective bargaining but reflected a consensus that a system of free collective bargaining was desirable to regulate and determine conditions of employment.

With the election of the Conservative Government in 1979, social policy for the promotion of collective bargaining was reversed and statutory measures to facilitate its extension were withdrawn. However, as far as support for collective bargaining was concerned, deregulation did not imply a return to a policy of collective *laissez-faire*. The law continued to regulate aspects of industrial relations such as industrial action, trade union government and the rights of individual employees. At present, legislation in Britain gives employees various rights which enable them to challenge managerial decisions to terminate the employment relationship, or to make the loss of a job more palatable, and concerns both substantive individual rights of workers and procedural aspects of collective bargaining, most notably in the form of a trade union's rights to information and consultation in the case of collective redundancies²⁷ and transfers of undertakings.²⁸

The British Government has, for the most part, claimed to support a theory of legal abstention or voluntarism and not to be intervening in the labour market, but justified pieces of legislation such as the Employment Acts of 1980 and 1982 first on the basis of safeguarding individual freedom, and second as measures "to improve the operation of the labour market by providing a more balanced framework of industrial relations."²⁹ This second type of reasoning shows an acceptance of the views of F.A.

²⁶During the mid-1970s when legislation was beginning to touch on many aspects of employment and industrial relations, observers were able to conclude that there was an "indubitably fundamental and irreversible trend" towards legal regulation of industrial relations (R. Lewis, "The Historical Development of Labour Law," 14 *Brit. J. Indus. Rel.* 1, 15 (1976)) and that the increase in collective labour law as well as employment protection legislation provided "definite, justifiable principles which were to affect the patterns of industrial relations conduct." (Ferdinand von Prondzynski, "The Changing Functions of Labour Law," in *Industrial Relations and the Law in the 1980s* 179 (P. Fosh and C.R. Littler eds., Aldershat, Hants, England 1985).)

²⁷Secs. 99-107 of the EPA 1975 were essentially an implementation of the EC's Directive on Collective Redundancies 75/129/EEC (O.J. Eur. Comm. (No. L 48) 29 (1975)).

²⁸Transfer of Undertakings (Protection of Employment) Regulations 1981, which was an implementation of the EC Directive on Safeguarding Employees' Rights in the Event of Transfers of Undertakings 77/187/EEC (O.J. Eur. Comm. (No. L 61) 26 (1977)).

²⁹Norman Tebitt, Secretary of State for Employment, speaking during the Second Reading of the Employment Bill 1982, 17 *Parl. Deb., H.C.* (6th ser.) col. 741 (8 February 1982).

Hayek who considered trade unions to be "economically very harmful and politically exceedingly dangerous",³⁰ and observed that they were using their power in a way which was "rapidly destroying the economic order."³¹ On the whole, Government policies have been directed at the traditional practice of collective bargaining with the object of relieving the labour market of the distorting influences of collectivism. These policies have involved extensive privatisation of public corporations and strongly unionised local authority services, the decentralisation of collective bargaining to the level of the corporation or the plant where union strength during times of unemployment is relatively weak, and legislation restricting the freedom to organise, to bargain and to strike.³² In particular, Government policy led to the repeal of the statutory procedure which unions could invoke to secure recognition for bargaining purposes,³³ thus removing the foundation of the statutory structure for the encouragement of collective bargaining. Recognition as the crucial step in the development of the bargaining relationship and the securing of trade union rights became a voluntary process. By withholding recognition, it has become possible for employers to avoid statutory duties including disclosure of information for collective bargaining purposes³⁴ and consultation over redundancies³⁵ or over proposed transfers of a business³⁶.

Because of this action by Government and other factors such as fundamental changes in technology and the labour market, particularly the increase in service

³⁰F.A. Hayek, *The Constitution of Liberty* 272 (Chicago 1960).

³¹F.A. Hayek, 3 *Law, Legislation and Liberty* 144 (Chicago 1982). However, this explanation has been mostly concealed by primarily forwarding the libertarian argument - legislation is needed to combat the coercive power of unions which restrains individual freedom - and the Government has preferred not to refer to the economic power of trade unions, nor to state the economic aims of legislation expressly. In terms of public relations, to gain acceptance for its policies, the Government's tactics have been successful. By diverting attention away from the economic, and social objectives of legislation, the odious consequences of the type of legislation have often gone unnoticed. Most notably, the proclaimed protection of the freedom of the individual under the law frequently runs counter to the safeguarding of workers' interests in the employment relationship.

³²B.A. Hepple, "The Harmonisation of Labour Law in the EEC: A British Perspective," 6 *Recht der Arbeit* 348, 349 (1989).

³³EA 1980.

³⁴EPA 1975, sec. 17(2).

³⁵EPA 1975, sec. 99(1).

³⁶Transfer of Undertakings (Protection of Employment) Regulations 1981 (S.I. 1981 No. 1794), Regulations 10 and 11.

industries and the growth of a "marginal" workforce, union density has declined and collective regulation has had a smaller impact. Collective bargaining practices have not been able to keep pace with changes in the organisational structure of business and have been affected by the general economic decline and high level of unemployment. The future is uncertain, but Lord Wedderburn's vision of a future in which "regulation is inescapable" seems very plausible, for the "context for tomorrow's labour may be more desperate than that of previous years".³⁷

Law and industrial relations in South Africa

The South African Labour Relations Act,³⁸ based on a voluntarist model of industrial relations, broadly promotes the practice of collective bargaining. Amending legislation introduced in 1979, was generally regarded as heralding a new era, not because it constituted a break with existing practices in industry, but because of its extended objective of institutionalising conflict in the economy by creating a uniform system of labour regulation. At the time of its introduction black workers were excluded from the institutions and procedures of industrial legislation. The exclusion was regarded as undesirable both by multinational corporations who, experiencing pressure due to their involvement in South Africa, pushed for labour reforms which would reflect internationally acceptable standards, and by established unions who acted with a similar self-interested motive but with a narrower agenda. Established unions felt the constraints which the system of registration and participation in industrial councils imposed upon them, as compared to emerging black unions which could act in unrestrained fashion and make extravagant demands which appealed to a broad base of workers. Unions who were already operating within a system of labour regulation wished to retain their existing rights, but see all unions subjected to the same statutory discipline.

The Government contemplated the risks of regulatory action, but calculated that a uniform system of labour regulation would not entail inordinate costs to industry. Moreover, regulation could promote orderly union formation and collective action, and by and large fit in with the Government's own design of controlling and gradually

³⁷Lord Wedderburn, *The Worker and the Law* 861 (3d ed. London 1986).

³⁸Act 28 of 1956.

incorporating some of the ostracised elements of society.³⁹ The legislation adopted was a combination of statutory defences and incentives; it made provision for the registration of unions to make them eligible for membership of established bargaining forums, the industrial councils, and it incorporated the requirement of a mandatory conciliation phase to gain access to the Industrial Court. In terms of the Act, unions were allowed to organise and to act collectively, but the actions and aims of unions could be supervised in the final instance by the Industrial Court.

Unions responded to the amended labour laws with scepticism and hostility. One commentator expressed the reasons for labour's reaction as follows:

"Registration and the widened possibilities for legalism contained within it will further tend to bureaucratised unions, will further remove the union from the control of the workers. The insidious effects of the South African industrial relations system are not enshrined in the operation of industrial councils but in the tradition of legalism and anti-organisation which it has nurtured."⁴⁰

Suspicion and opposition were normal responses to initiatives from a legislator who, in the political field, had established a tradition of merciless state repression. And yet it soon became clear to unions that, in the field of industrial relations, the law could be used as a strategic tool and provide them with significant leverage. Official sanction of the principle of freedom of association allowed unions to organise more extensively and to gain more members.⁴¹ A procedural change to the law on 1 September 1982⁴² which granted the Industrial Court the power to decide whether parties ought to be given status quo relief⁴³ in the event of disputes over dismissals, changes to employment terms and alleged unfair labour practices, induced the trade union movement to make serious and extensive use of the law.⁴⁴ The status quo provision was intended to prevent unilateral action by restoring the employment and

³⁹Clive Thompson, "Trade Unions Using the Law," in *Law and Social Practice* 335, 336-7 (Hugh Corder ed., Cape Town 1988).

⁴⁰M. Nicol, "Legislation, Registration, Emasculation," 5 S. Afr. Lab. Bull. (Nos. 6 & 7) 44, 56 (1980).

⁴¹Membership of unregistered trade unions grew by some 500% from the beginning of 1980 to the end of 1981 (according to the National Manpower Commission Report for the period 1 January 1982 to 31 December 1982, RP 45-1983).

⁴²In terms of sec. 8 of the Labour Relations Amendment Act 51 of 1982.

⁴³Sec. 43. of the Labour Relations Act 28 of 1956.

⁴⁴From 1979 until the beginning of 1982 the Industrial Court made only 10 unfair labour practice determinations. In 1983, 110 status quo applications and 22 unfair labour practice determinations were instituted, and in 1985 the figures rose to 529 and 228 respectively. See K. Jowell, "Of Invention and Intervention: Collective Bargaining after Wiehahn," 3 Indicator 14 (1986) (Publication of Centre for Applied Social Sciences, University of Natal, Durban).

bargaining position which had prevailed previously, pending settlement through conciliation or adjudication. Unions realised that the law held advantages for them in the settlement of their immediate disputes with employers; unions also became aware of the opportunity created by the open-ended status quo and unfair labour practice definitions, to argue that these concepts be interpreted in accordance with accepted international legal norms.⁴⁵

The Industrial Court's interpretation of the statutory concepts formed the basis of new statutory rights for workers and worker organisations. Arguments based on the International Labour Organisation's standards regarding termination of employment were accepted by the Court when it developed its unfair dismissal jurisdiction, and by the same token overturned arbitrary action by the employer.⁴⁶ Similarly, the Industrial Court has introduced guidelines for employers who dispense with redundant labour for reasons of recession or technological change.⁴⁷ Although the Court has not been able to address the problem of the economy's incapacity to provide sufficient jobs, and has not provided for job security, it has effectively mitigated some of the harsh consequences of employment loss. In terms of its statutory brief to promote industrial peace and welfare, the Court has striven to balance the cost savings of an employer who dispenses with surplus labour, with the charges which this practice foists on the wider society.

For all the Court's intervention to establish labour standards, it has always placed a high premium on autonomous sanctions in the collective bargaining process, and has not been able to escape the ubiquitous tension between judicial intervention and abdication. Since the introduction of the unfair labour practice definition the Court has been vexed by the problem of defining the perplexing boundary between autonomous action and legal enforcement. Most notably, this problem manifested itself with regard to recognising a duty to bargain. For many years the Court, clinging to peculiar notions of voluntarism, refused to make an order that a party was to

⁴⁵This argument will be strengthened considerably by the inclusion in the new Constitution of the Republic of South Africa 1993 under the chapter on fundamental rights (Chapter 3), the right of every person to fair labour practices (sec. 27(1)). Chapter 3 of the Constitution must be interpreted in accordance with accepted international legal norms.

⁴⁶The development of the unfair dismissal jurisdiction can be traced back to the case of *MAWU v. Stobar Reinforcing (Pty.) Ltd.*, (1983) 4 I.L.J. 84 (I.C.).

⁴⁷See, e.g., *Shezi v. Consolidated Frame Cotton Corporation Ltd.*, (1984) 5 I.L.J. 3 (I.C.); *GWU v. Dorbyl Marine (Pty.) Ltd.*, (1985) 6 I.L.J. 52 (I.C.).

negotiate in good faith.⁴⁸ However, within a decade after South Africa's "modern labour law" had come into being, it was firmly established and accepted by all the members of the Industrial Court that the Act empowered the Court to impose bargaining duties in appropriate circumstances.⁴⁹ Recognition of a duty to bargain, of course, only raises the more perplexing questions of deciding whether bargaining rights should be extended to both minority and majority unions,⁵⁰ and of determining both the scope of the bargaining agenda and the appropriate bargaining unit or level.⁵¹ The latter question has acquired greater substance due to a change in the balance of forces on the ground: unions which have become more powerful at industry level wish to secure bargaining at that level while employers, concerned about union strength, production flexibility and adaptability in increasingly competitive domestic and global markets, resist this situation.⁵² Questions such as these will no doubt continue to vex the Court in the years ahead.

In this transitional stage of South Africa's history the institution of collective

⁴⁸See, e.g., *BCAWU v. Johnson Tiles*, (1985) 6 I.L.J. 210 (I.C.) and *MAWU v. Hart*, (1985) 6 I.L.J. 478 (I.C.).

⁴⁹The Labour Appeal Court has sanctioned in general terms the duty to negotiate with a representative trade union (See *Sentraal-Wes Ko-op (Bpk.) v. FAWU*, (1990) 11 I.L.J. 977 (L.A.C.)). The Industrial Court has stated categorically (in *SACTWU v. Maroc Carpets & Textile Mills (Pty.) Ltd.*, (1990) 11 I.L.J. 1101, 1104E (I.C.)):

Let it at once be said that, despite some earlier decisions to the contrary, it is clear that this [C]ourt today unequivocally recognises the existence of an enforceable duty upon all employers to bargain with trade unions representative of their employees, in respect of all matters concerning their relationship with those employees.

Both the Appellate Division and the Supreme Court have recognised the wide sweep of the unfair labour practice definition which impacts on voluntarism in collective bargaining. See, e.g., *Consolidated Frame Cotton Corporation Ltd. v. The President, Industrial Court*, (1986) 7 I.L.J. 489 (A.D.) and *Trident Steel (Pty.) Ltd. v. John N.O.*, (1987) 8 I.L.J. 27 (W.L.D.).

⁵⁰The Act appears to favour bargaining systems which operate on majoritarian principles. See *Ramolesane v. Andrew Mentis*, (1991) 12 I.L.J. 329 (L.A.C.), and also *SA Association of Municipal Employees v. Pretoria City Council*, 1948 (1) S.A. 11, 17 (T.). But cf. *Veldspun (Pty.) Ltd. v. ACTWUSA*, (1992) 13 I.L.J. 41 (E.). The Court has at times endorsed a "pluralist" approach, and required an employer to bargain with any union which is "sufficiently representative" of employees in a bargaining unit. See, e.g., *SACCAWU v. Southern Sun Hotel Corp. (Pty.) Ltd.*, (1992) 13 I.L.J. 132 (I.C.) and *MWU v. East Rand Gold & Uranium Co. Ltd.*, (1990) 11 I.L.J. 1070 (I.C.). An extreme case of multi-unionism was advanced in two cases decided under the now repealed 1988 unfair labour practice definition. See *National Baking and Allied Workers Union v. BB Cereals (Pty.) Ltd.*, (1989) 10 I.L.J. 870 (I.C.) and *RTEAWU v. Tedelex (Pty.) Ltd.*, (1990) 11 I.L.J. 1272 (I.C.). It can be argued that these decisions now carry little, if any, weight.

⁵¹See, generally, S. Bendix & S.M. Swart, "The Collective Bargaining Structure in South Africa: An Appraisal of the Present System," 2 Indus. Rel. J.S. Afr. 1 (1982). The authors compare the advantages and disadvantages of centralised and decentralised bargaining to illustrate that the two systems are not in conflict.

⁵²See Clive Thompson, "Collective Bargaining," in [1991] 2 S. Afr. Hum. Rts. & Lab. L. Y.B. 271, 278 (M. Robertson ed., Cape Town 1992).

bargaining and the Courts' role in the process will remain under stress and is likely to change fundamentally. Clive Thompson has described the "increasingly painful path of transition" as one which is characterised by widespread discord at the plant and in industry. On the shopfloor "the relationship between most parties is highly adversarial and distinctly unproductive. The peace obligation remains as elusive as meaningful worker participation in the enterprise."⁵³ The Labour Court's inconsistent decisions have added to the uncertainty of the parties, and the Court has not always been able to extract lasting values from the evanescent statutory regime.

Inevitably the labour arena is influenced by policies of the Government, which, at present, focus on deregulation⁵⁴ and privatisation.⁵⁵ A future Government, in which the African National Congress is bound to play a forceful role, might be more concerned with redistribution of wealth and an enlarged role for the state. The broad concern of labour, which is supported by a growing consensus to democratise society, is to extend democratic structures beyond the political process to industry and the economy. Trade unions are anxious to impact upon economic policy decisions, such as employment creation, inflation, economic growth, investment, income policy, training and productivity, either at national political level or in some type of tripartite forum in which employer associations and unions participate with Government officials.⁵⁶ Generally, extending the frontiers of industrial democracy means

⁵³Clive Thompson, "Collective Bargaining," in [1991] 2 *S. Afr. Hum. Rts. & Lab. L. Y.B.* 271, 272 (M. Robertson ed., Cape Town 1992).

⁵⁴Deregulation has been advanced by the Government as a policy which would encourage growth and stimulate small business. Various strategies have been used to achieve these policy objectives, including encouragement of local authorities to streamline their by-laws, administrative processes and legislation. An important piece of legislation was the Temporary Removal of Restrictions on Economic Activity Act of 1986. In addition, as part of the general trend of deregulation, the Department of Manpower has granted an increasing number of exemptions from industrial council agreements, which left workers in small, poorly organized undertakings with low wages and poor working conditions. The union movement's response to policies of deregulation involved arguments for nationalisation and centralisation. See Dick Usher, "Developments in the Trade Union Movement," [1991] 2 *S. Afr. Hum. Rts. & Lab. L. Y.B.* 291, 297-8 (M. Robertson ed., Cape Town 1992).

⁵⁵Unions have fiercely opposed the privatisation of state industries such as the steel industry, transport services, health services, posts and telecommunications, mainly because the practice is seen as discrimination against those who, for political reasons, had been denied services in the past. Privatisation also meant a reduction in job opportunities at a time when unemployment figures were rising. See Dick Usher, "Developments in the Trade Union Movement," in [1991] 2 *S. Afr. Hum. Rts. & Lab. L. Y.B.* 291 (M. Robertson ed., Cape Town 1992).

⁵⁶Tripartite forums which operate at present include the National Manpower Commission, which was restructured in August 1992 to comprise one third business, one third labour and one third Government representatives, and the National Economic Forum comprising business, labour and Government representatives.
(continued...)

expanding the areas of economic decision-making which are negotiated by labour and capital. In pursuit of this agenda, it is essential to probe the possibilities of legislative intervention and legal reform.

Pluralist model

The overview of law and industrial relations in the USA, the UK and South Africa on the whole indicates the failure of voluntary regulation to bring about a more equal distribution of power or to introduce standards of industrial justice in the workplace. A better understanding of how this failure occurs can be gained from looking at the pluralist model of industrial relations. The pluralist model expressly recognises a divergence of legitimate interests and objectives within the workplace. Management's primary interest is in running the business in the most efficient manner whereas employees are concerned with maintenance of employment security. While competing interests give rise to conflict, pluralists stress that this conflict is tolerable only within certain limits and that differences should be reconciled and conflict restrained in order to achieve industrial peace in the public interest.⁵⁷ Reconciliation and restraint is possible since an industrial relations system creates an ideology or commonly shared body of ideas and beliefs which helps to bind the system together.⁵⁸ Shared assumptions about the nature of the enterprise and a mutual necessity to survive constrains the amount of conflict.⁵⁹

The pluralist emphasis on limited workplace conflict makes it essential that collective bargaining should occur only in those instances where a widespread basic consensus can be found which may yield to a compromise or synthetic solution.⁶⁰ Alan Fox suggests that an acceptable and workable compromise can only be reached

⁵⁶(...continued)

representatives, which was launched in October 1992 after extended negotiations between the three parties. For unions the forum provides an opportunity to participate in decisions affecting the economy.

⁵⁷The idea of industrial peace is based upon the assumption that there is a public interest common to a plurality of interest groups within a society. See A. Flanders and H.A. Clegg, *The System of Industrial Relations in Great Britain* 318, 322 (Oxford 1954). The Webbs, shortly after the turn of the century mentioned intervention by a democratic state in industrial disputes in the interest of the community as a whole. S. and B. Webb, *Industrial Democracy* xxvii, 813-4, 823 (London 1902).

⁵⁸John Thomas Dunlop, *The Industrial Relations System* (New York 1958).

⁵⁹See A. Goldsmith, "The Management-Control Collective Bargaining Relationship: Three Models," 24 *Osgoode Hall L.J.* 792 (1986).

⁶⁰Alan Fox, *Beyond Contract* 264-5 (Salem, New Hampshire 1974).

if each party limits its claims and aspirations to a level which the other finds sufficiently tolerable. The compromise which Fox refers to implies containment of the substantive aspirations of employees to marginal improvements in their lot, "not for eliminating private property, hierarchy, extreme division of labour, and the principles and conventions which support great inequalities of wealth, income, and opportunities for personal fulfilment."⁶¹ According to Fox, pluralists accept as natural and inevitable that trade unions should pursue limited and readily negotiable objectives.⁶²

The thought that unions must limit their aspirations is expressed in somewhat different terms by Clegg when he argues that a trade union, while it must oppose, must not "avoid responsibility at all costs." He insists that it is necessary for a union both to oppose and to agree.⁶³ By limiting union aspirations, pluralists do not envisage joint regulation by management and labour as a "major change in the organisation of industry in the fundamental distribution of power and control," and pluralistic mechanisms must be valued only as means for "resolving marginal discontents and disagreements."⁶⁴ Within the boundaries of the rules established by the parties to govern the workplace, it is foreseen that "the great battles over conflicting manifestos will be replaced by a myriad of minor contests over comparative details."⁶⁵

The pluralist exegesis of an industrial relations system suggests that collective bargaining intrudes to some extent on the prerogatives of unrestrained management.⁶⁶ According to Cox, collective bargaining serves to substitute a rule of law for absolute authority.⁶⁷ At the same time the relationship between managerial authority and collective bargaining remains uncertain, and pluralist writers often emphasise that management has some "reserved rights, inherent rights, exclusive rights which are not

⁶¹*Id.* at 278.

⁶²*Id.* at 278.

⁶³H.A. Clegg, *Industrial Democracy and Nationalization* 28-30 (Oxford 1951).

⁶⁴*Id.* at 281-2.

⁶⁵C. Kerr, J.T. Dunlop, F.H. Harbison and C.A. Myers, *Industrialism and Industrial Man* 290-1 (Cambridge, Massachusetts 1962).

⁶⁶See David E. Feller, "A General Theory of the Collective Bargaining Agreement," 61 Calif. L. Rev. 663, 721-22 (1973).

⁶⁷A. Cox, "Some Aspects of the Labor Management Relations Act, 1947," 61 Harv. L. Rev. 1, 1 (1947).

diminished or modified by collective bargaining."⁶⁸ Goldberg regards management's inherent rights as including determination of "the product, the machine to be used, the manufacturing method, the price, the plant layout, the plant organization, and innumerable other questions."⁶⁹ Feller ascribes management's retained rights to the nature of the modern industrial enterprise and admits that the scope of the union's input is limited from the start: "management and union are not coordinate partners in administration."⁷⁰

The area of retained management rights is one of the areas of contradiction within the pluralist model which ultimately skews the outcome of collective bargaining toward management. Despite recognition of the collective bargaining process and the aura of industrial justice surrounding it, pluralist assumptions as implemented in the case law, impose severe limitations on unions to express their needs and to participate with management in making the industrial decisions which affect workers' lives. The assumption that management has absolute discretion to make crucial decisions destroys the illusion of initial parity in the negotiating process and reinforces the asymmetry of power in the employer-employee relationship.

The basic paradox in the pluralist approach as set out above is that it starts from the premise of a conflict of interest within the employment relationship but proceeds to emphasise marginal digressions and limited divergences, compromise and consensus. Along the path from conflict to consensus union interests are diminished in various ways, while management prerogative to pursue its aims is accommodated. Although collective bargaining law acknowledges the justice of worker participation in industrial decisions affecting their lives, this participation is carefully controlled and restricted. In the discussion which follows it will become clear how pluralist values and assumptions find expression in collective bargaining law and influence the nature of the relationship and the degree of shared decision-making between the parties.

⁶⁸A. Goldberg, "Management's Reserved Rights: A Labor View," in *Management Rights and the Arbitration Process* 118, 123 (J. McKelvey ed., Washington 1956)(A publication of the National Academy of Arbitrators).

⁶⁹*Id.* at 123.

⁷⁰David E. Feller, "A General Theory of the Collective Bargaining Agreement," 61 Calif. L. Rev. 663, 770 (1973).

Law as a source of power

Pluralist theory occupies a middle view between extreme theoretical positions regarding the power which can be imputed to the law. The extremes range from materialist social theory to theories of deregulation. While materialist theory such as traditional Marxism ascribes to the law the responsive but uncreative role of sustaining and protecting existing social and economic practices, deregulation theorists, seemingly aware of the powerful force of the law, wish to prevent it from aiding the collective forces in society. More central but more ambiguous than either of these positions is pluralism which accedes to a limited but rather emasculated role for the law. In this section it will be argued that pluralism and other theories which eschew the use of the law to introduce social justice in the employment relationship are inadequate. The point is the simple one that law *can* influence the labour market. If this is accepted, as it was in the European Community's social policy which inspired regulation in the case of business transfers, the more important question can be considered concerning the principles in terms of which the law should regulate.

The voluntarist argument for a system of free collective bargaining as the primary source of regulation,⁷¹ is based on the assumption that battles in the work place need to be "carried on in a fair and equal way"⁷² and that an equilibrium of social forces should therefore be attained. Legal intervention is usually allowed to the extent that it is necessary to redress the inequality of bargaining power. However, the analysis of the pluralist model above shows that the law operates in a way that collective bargaining is unable effectively to constrain the exercise of managerial prerogative. The restrictive operation of the law is clearest in the case of the United States, where the law is apparently used to promote collective bargaining, but is carefully controlled to prevent unions from questioning decision-making.⁷³ Fox has

⁷¹See, e.g., *Kahn-Freund's Labour and the Law* (P.L. Davies and M. Freedland eds., 3d ed. London 1983). Kahn-Freund believed that "the main object of labour law has always been...to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship" (at 18). But the impact of the law is "secondary if compared with the impact of the labour market (supply and demand) and...with the spontaneous creation of a social power on the workers' side to balance that of management" (at 19). "As a power countervailing management, the trade unions are much more effective than the law ever has been or can ever be" (at 21).

⁷²See the statements made by the American judge Oliver Wendell Holmes in a dissenting judgement in the Massachusetts Supreme Court in the case of *Vegeahn v. Gunter*, 44 N.E. 1077, 1081 (1896).

⁷³The restrictions upon mandatory subjects of bargaining can be found in the National Labor Relations Act sec. 8(a)(5) and 8(d), 29 U.S.C. sec. 158(a)(5) and 158(d) as interpreted in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

argued that there is an illusion of a power balance which rests on the "continuing acceptance by the less favoured of social institutions and principles which support wealth and privilege."⁷⁴ This acceptance is to a certain extent forced upon them by the official condemnation of any challenge to the basic social and political structures as being contrary to the "public interest", an oft-used but murky term which conceals a clear bias for the established order.

The failure of the law to redress inequality of bargaining power is not due to some basic passivity or impotence to intervene in industrial relations, but rather to its active support of the power of capital through the concept of private property and contract. Contrary to traditional Marxist materialist theory which maintains that economic and social practices and conditions determine the form and content of the law, and that the law acts somewhat passively to perpetuate existing productive relations, it is possible to argue that the imbalance of power in the employment relationship originates in the contract of employment and the legal principle of freedom of contract. The freedom to conclude employment contracts, while always an illusory freedom for wage earners, has legitimised the employer's exercise of power and an unlimited managerial prerogative to direct labour under the contract. Contract, essentially, expresses the employer's superior bargaining power. The development of substantive standards of employment protection, such as those establishing a degree of protection against dismissal, including protection in the case of transfers of undertakings, can be seen as a way to counteract the employer's boundless freedom. Procedural regulation has a similarly important function, not in setting standards to which contracts must conform, but in establishing processes for making standards and for resolving disputes with regard to employment standards. This kind of "auxiliary" regulation can open up avenues for participation that enable employees to influence business decisions, such as a decision to transfer control, which have far-reaching consequences for their future employment, since the decision may lead to a new employer adopting policies that affect them adversely.⁷⁵

Theories of deregulation generally deny that substantive or procedural

⁷⁴Alan Fox, "Industrial Relations: A Social Critique of Pluralist Ideology," in *Man and Organization* 211 (J. Child ed., London 1973).

⁷⁵P.L. Davies, "Acquired Rights, Creditors' Rights, Freedom of Contract, and Industrial Democracy," 9 Y. B. Eur. L. 21, 22 (1989) points out that even if existing rights were fully protected, a new controller might implement personnel and manpower policies different from those adopted by the old controller which would result in the future development of terms and conditions of employment, of non-contractual conditions and even of job opportunities in a way that was adverse to the interests of the employees.

regulation serves any legitimate purpose, and express concern that such regulation amounts to unjustified expropriation of employers' property rights. Among those who are critical of labour law regulation, Hayek is most influential, condemning all social legislation which aims "to direct private activity towards particular ends and to the benefit of particular groups."⁷⁶ Trade union power, according to Hayek, is one of the important causes of high unemployment and inflation.⁷⁷ A similar reproach of legislative support for unions is found in the work of a scholar such as Posner who argues that unions engage in "rent-seeking" activities which allow them to extract a monopoly rent from employers, to the detriment of consumers and the unemployed.⁷⁸ In the view of deregulation theorists, the solution to mass unemployment requires the removal of all forms of labour-market regulation which impedes the free flow of goods and services.

A critique of policies of deregulation which focus upon the need for greater "flexibility" of employment and for the removal of "rigidities" in the labour market, is offered by Mueckenberger and Deakin. Instead, they argue for re-regulation which implies the "re-construction of existing legal and institutional structures, in order to achieve an increase in individual freedom and welfare within a network of collective security and participation."⁷⁹ Their main criticism concerns the notion, implicit in all theories of deregulation, that economic relations take place in a "state of nature" which is independent of all but the most basic or minimal forms of state regulation."⁸⁰ They point out convincingly that all causes of market failure are not exogenous to the market but do sometimes lie within the economic process itself. Efficiency might therefore occasionally require public policy intervention. Furthermore, markets allow for concentration of private economic power which may be highly coercive, especially since such economic power is supported by the private law of property and

⁷⁶F.A. Hayek, 1 *Law, Legislation and Liberty* 141-42 (Chicago 1973).

⁷⁷F.A. Hayek, 1980s *Unemployment and the Unions. Essays on the impotent price structure of Britain and monopoly in the labour market* 18 (2d ed. London 1984).

⁷⁸R.A. Posner, "Some Economics of Labor Law," 51 U. Chi. L. Rev. 988 (1984).

⁷⁹Ulrich Mueckenberger and Simon Deakin, "From Deregulation to a European Floor of Rights: Labour Law, Flexibilisation and the European Single Market," 3 *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht* 153, 154 (1989).

⁸⁰*Id.* at 177.



contract.⁸¹ This form of legal regulation may have greater coercive potential than any form of labour or social legislation.⁸²

The private law of property and contract underwrites the strong position of shareholders in relation to labour's wage-dependent, propertyless state. If one perceives the labour market's main characteristics - relative insecurity and inequality - not as being a state of nature, but as being created by legal and social institutions, then it should be apparent that the introduction of social regulation can lead to a labour market with different properties, such as equity and efficiency. An expanded role for the law can affect the power relations between capital and labour, and, within limits, aid free collective bargaining in finding a solution to the problem of market power. Social legislation can be efficient in that it recognises the mutual dependency of employer and employee in the employment relationship and the need for the employee to feel part of the firm as an incentive to perform better.⁸³

The fear and aspirations of employers and employees since the latest amendments to legislation regulating transfers in the UK support the understanding that law and social power are interrelated, not separate, and that law can be a source of power in industrial relations. The effect of the law in the small but important area of business transfers strengthens the insight that, as much as the legal rules defining private property generally give owners of capital the choice to put it to productive use or not, legal rules influence the relative strength of labour. However, recognising the potency and relevance of the law, does not mean that law can immediately change the demands and aspirations of labour and capital. Many examples of legal intervention provide proof of difficulties in changing the relative power of social forces. The reasons for a large body of "ineffective law" will be considered in the next section.

Ineffective law

The use of law to promote collective bargaining can appear ineffective in legal systems governed by the philosophy of industrial pluralism. This apparent inability of the law to control the social forces of capital and labour can be observed most clearly

⁸¹In the UK this translates into "judge-made common law". *Id.* at 182.

⁸²*Id.* at 179.

⁸³In this sense one could probably utilise the phrase "the political preconditions of economic performance", a phrase which Mueckenberger and Deakin use when they make the sociological observation that regulation is an inevitable precondition of the existing mode of production. *Id.* at 192.

in the United States with regard to the legal duty to bargain, but also in South Africa where a similar duty has been introduced through legal interpretation and is now widely recognised. Likewise, legislation which was not designed to promote collective bargaining, but as statutory rights for individual employees, can at times appear impotent. An example can be found in some of the statutory rights accorded to individual employees in the United Kingdom.

In the United States, legal controls that restrict the bargaining power of unions, frustrate the hopes of employees and grant management freedom to exercise autocratic power over the workforce. Although the law ostensibly diminishes inequality of bargaining power, employees remain in a subordinate position with regard to employers' capacity to make investment decisions or to dispose of capital. Collective bargaining, which takes place in terms of the legislative duty to bargain in good faith, has never succeeded in making significant inroads into the area of managerial prerogative. Bargaining is restricted to terms and conditions of employment, but an employer can refuse to bargain about the so-called permissive subjects of bargaining, which include strategic economic decisions. The cause of the law's ineffectiveness has been ascribed to the complex legal procedures required to enforce the duty to bargain,⁸⁴ and to the esteem in which the law holds the legal rules which define the concept of private property and guarantee the free disposal of capital. The duty to bargain is limited on the assumption that employees should have no say in strategic business decisions and should not be able to encroach too far on managerial prerogative. Similarly, in South Africa expression of union needs and aspirations have been limited in accordance with pluralist assumptions which render employee interests insignificant in comparison to dominant employer concerns. Collective bargaining in Britain, operating without legal support but under the same assumptions, is restricted indirectly by the scope of a union's liability to actions for an injunction and damages if the union's demands fall outside the statutory list of permissible topics.⁸⁵

Legal restrictions, therefore, inhibit collective bargaining but the picture is more complicated. Collective bargaining is also inhibited by practical considerations. Successful bargaining takes place within a framework which allows demands to be supported by the threat of industrial action. Mobilisation to make this a serious threat

⁸⁴Clyde W. Summers, "Industrial Democracy: America's Unfulfilled Promise," 28 Clev. St. L. Rev. 29 (1979).

⁸⁵Trade Union and Labour Relations (Consolidation) Act 1992, secs. 178, 218.

can be achieved when the subject is of immediate concern to workers, for instance wages and hours, but becomes more difficult in the case of issues which are vague and less immediate, such as investment policy or pension benefits; managerial prerogatives over matters such as these are often left untouched.

Legal regulation of collective bargaining suffers from an even more fundamental problem caused by labour market segmentation. Official support for collective bargaining has failed altogether to benefit the increasing number of employees who work in the so-called secondary labour market, characterised by small-scale industries with little job security and low pay.⁸⁶ There are grounds for serious misgivings that law can ever promote the practice of collective bargaining to a notable extent in the secondary labour market.

Considering the problems of regulating collective bargaining, one would expect the regulation of employee rights to be more susceptible to successful legal solutions. Positive legal rights and duties in many areas now directly regulate "matters which were once entirely within the sphere of managerial prerogatives, or left to collective bargaining",⁸⁷ and research has shown that the introduction of such rights has had a major impact on management behaviour. For instance, the incorporation of natural justice and due process into the law of dismissal has influenced employers to make decisions "after a reasonably careful investigation following a fair procedure."⁸⁸ There have also been suggestions that the effect of individual employment legislation is not confined to individual employees, but indirectly, the norms and values of such legislation influence collective bargaining where it occurs. Most likely, the interaction between legal and voluntary regulation takes place in a way which was described by Dickens et al. as follows:

"voluntarily agreed norms and procedures are not *replaced* necessarily by legal ones, but rather their form and operation may be modified and informed by an awareness of the legal provisions and their operation."⁸⁹

⁸⁶M.J. Piore, "Notes for a Theory of Labor Market Stratification," in *Labor Market Segmentation* (R.C. Edwards, M. Reich, and D.M. Gordon eds., Lexington, Massachusetts 1975).

⁸⁷B. Hepple, "Individual Labour Law," in *Industrial Relations in Britain* 393 (G.S. Bain ed., Oxford 1983).

⁸⁸B. Hepple, "Individual Labour Law," in *Industrial Relations in Britain* 393, 411 (G.S. Bain ed., Oxford 1983) and "The Fall and Rise of Unfair Dismissal" in *Legal Intervention in Industrial Relations* 79 (W. McCarthy ed., Oxford 1992). See also L. Dickens, M. Jones, B. Weekes and M. Hart, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System* 252 (Oxford 1985).

⁸⁹L. Dickens, M. Jones, B. Weekes and M. Hart, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System* 252-3 (Oxford 1985).

These positive evaluations of the influence of regulatory individual rights should be encouraging to lawyers who would like to believe that the law is able to bring about a radical transformation in the conduct of labour relations. However, their impact may not have been as meaningful as intimated and it is significant that the present Government which is excessively concerned with the burdens on management, has not consistently opposed this development. The lack of strong opposition to (albeit not uncritical approval of) the extension of employment protection may be suggestive of its value and there are scholars who have been sceptical of the protection which this legislation purports to offer. Two of the redundancy legislation's proclaimed objectives are now generally regarded as mythical: the compensation for workers who lose their jobs through no fault of their own has not been enough to make up for consequential losses, or to encourage occupational and geographical mobility to any notable extent.⁹⁰ The overall achievements of the statutory redundancy payments scheme have been unimpressive, and although increased productivity through reduced staffing is often noted as one of its accomplishments,⁹¹ many redundancies would probably have come about without statutory intervention, as a result of economic pressures alone. In general it has failed to enhance job security. Similarly, the unfair dismissal legislation falls short of its stated aim of improving job security, as is apparent from the low incidence of re-employment which follows complaints of unfair dismissal,⁹² and in many instances appears to do no more than attach a price to the traditional right to fire.⁹³ Procedural fairness is not always required and judicial approval has been given to arbitrary dismissals if these are proved to be for a substantial reason, for example, in the case of workers who refuse to go along with business reorganisations in the interests of increased efficiency.⁹⁴

This outcome can be explained in terms of the overall objective of the legislation which has as much relevance for securing employment rights as for

⁹⁰See R.H. Fryer, "The Myths of the Redundancy Payments Act," 2 *Indus. L.J.* 1 (1973).

⁹¹Paul Lewis, *Twenty Years of Statutory Redundancy Payments in Great Britain* 31 (Leeds-Nottingham Occasional Papers in Industrial Relations 1987).

⁹²L. Dickens, M. Jones, B. Weekes and M. Hart, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System* 111 (Oxford 1985).

⁹³Bob Simpson, "British Labour Relations in the 1980s: Learning to Live with the Law," 49 *Mod. L. Rev.* 796, 804 (1986).

⁹⁴The leading case is *Hollister v. N.F.U.*, [1979] *I.C.R.* 542 (C.A.). See J. Bowers and A. Clarke, "Unfair Dismissal and Managerial Prerogative: A Study of 'Other Substantial Reason'," 10 *Indus. L.J.* 34 (1981).

advancing managerial efficiency and stimulating capital mobility. The approach of tribunals which administer the law has given undue weight to policy considerations which show a strong concern for the realisation of managerial economic designs and the promotion of business, and has restricted the effectiveness of employment protection rights to offer individual protection. In part this may be ascribed to the continuing influence of the common law on their way of thinking,⁹⁵ in part to a managerialist approach towards the exercise of a discretion. Traditional common law concepts constitute the basis in which much of the employment legislation is rooted and which shapes judicial opinion. This explains the difficulties which the Courts have experienced in applying the concept of "employee" to a wide range of working relationships which are not easily characterised as involving notions of control or subordinated service.⁹⁶ In addition, Courts tend to exercise their discretion by deferring to management's dominance within the workplace and by subordinating the issue of workers' rights to those of workplace efficiency and harmony, without empirical support for their decision⁹⁷ and without any detailed enquiry as to practicability. The adoption of an adversarial, rather than an inquisitorial, approach in most Courts does not contribute towards a realistic assessment of the situation. A reason for the limited effect of "positive" law is therefore the failure of tribunals to take into account a complicated reality which might give substance to the rhetoric of

⁹⁵Many scholars of different viewpoints have been concerned that the employment protection laws are interpreted according to a tradition which does not recognise their purpose. See, e.g., P. Davies and M. Freedland *Labour Law: Text and Materials* 361-71 (2d ed. London 1984); B. Hepple, "Individual Labour Law," in *Industrial Relations in Britain* Chap. 16 (G.S. Bain ed., Oxford 1983) and "Restructuring Employment Rights," 15 *Indus. L.J.* 69 (1986); H. Collins, "Market Power, Bureaucratic Power and the Contract of Employment," 15 *Indus. L.J.* 1 (1986), and "Corporatist Discipline and Capitalist Control," 11 *Indus. L.J.* 170 (1982); H. Forrest, "Political Values in Individual Employment Law," 42 *Mod. L.Rev.* 361 (1979); Lord Wedderburn, "Labour Law: From Here to Autonomy?," 16 *Indus. L.J.* 1, 4-22 (1987).

⁹⁶This also explains the judicial approach to unfair dismissal and the reluctance to order re-employment. Traditionally Courts refused to order specific performance of a contract of employment for reasons that had to do with the inability to supervise effectively such an order, and with the rule of mutuality - if an order of specific performance could not be made against an employee since this would amount to compulsory labour then it could not be made against an employer either. This rule has endured, even though the contract of employment has never operated between two equal parties, and the phantom of the common law still lurks behind judicial interpretations of the legislative provision which empower tribunals to order re-employment. (This provision came into effect in 1976. See sec. 68 EP(C)A 1978.) It is reinforced by a general belief, informed by the attitudes of employers more than those of employees, that re-employment will not work (L. Dickens, M. Jones, B. Weekes and M. Hart, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System* 111-122 (Oxford 1985)).

⁹⁷Dickens et al. commented after considerable research regarding the viability of re-employment that "even using employer-based criteria what evidence there is cannot be seen as supporting the generalisation that re-employment will not work" (L. Dickens, M. Jones, B. Weekes and M. Hart, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System* 122 (Oxford 1985)).

workers' rights. The troubling feature of the tribunals' approach is that employer opposition alone determines their perception of reality, and they are unwilling to consider the whole picture of good industrial practice.

The same tension which can be observed in the UK statutory provisions on unfair dismissal and redundancy, is also evident in legislation for the protection of workers in the case of business transfers. The legislation raises two important issues. The first concerns the transfer of acquired rights, both individual and collective; the second, participatory arrangements that give employees the opportunity to influence the decision to transfer control. In both these matters an evident tension exists between the protection of the rights of employees, including their "property rights" in the job and their right to meaningful participation, and the interests of management in achieving its economic objectives effectively.

When the Transfer Regulations were first enacted in the UK they only seemed to add to the existing body of legislation which had proved ineffective in altering the social patterns of interaction in industry and influencing workers' power. For many years after the UK had adopted legislation with regard to the protection of workers in the case of business transfers, an analysis to determine the extent to which workers' interests were actually protected against what management often considered a basic prerogative to make structural business changes, led through a path filled with obstructions and surrounded by barricades. The legislation seemed to produce the same results as had been noticed with regard to the unfair dismissal and redundancy enactments.⁹⁸ Law that initially appeared to provide extensive protection for employees against managerial decisions which affected the context of their employment and their employment security turned out to be largely ineffective.

In 1991, the European Commission commenced infringement proceedings against the UK on the ground that the Regulations did not comply with European standards,⁹⁹ and in November 1992 the UK Government introduced the Trade Union Reform and Employment Rights Bill (TURER) into parliament, which was enacted in 1993. It can be expected that the legislative amendments will provide enhanced

⁹⁸See Steven D. Anderman, "Unfair Dismissals and Redundancy," in *Labour Law in Britain* 415-445 (Roy Lewis ed., Oxford 1986) and *Labour Law: Management Decisions and Workers' Rights* 171-181 (London 1992).

⁹⁹*Commission Report to the Council on progress with regard to the implementation of Directive 77/187/EEC relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.*

protection for workers affected by business transfers. The amended legislation supports the view that the ineffectiveness of the law was not due to some inevitable restraint or impotence, but was caused mainly by the way in which the legislation was drafted and weak sanctions. It cannot be expected, however, that the intrinsic dual policy considerations which used to characterise the law for the protection of workers in the case of business transfers will disappear. The tension between protecting workers' rights and permitting managerial prerogative operates over a large front of labour legislation and is suggested by the close connection of the law on transfers with the law of redundancy and dismissals. The strain of maintaining the delicate balance in terms of the dual motive for employment protection legislation is demonstrated across this whole spectrum. Even though the latest amendments to the law can be expected to work more effectively to express values of fairness and provide for the relative welfare of employees, the delicate balance can become distorted in several ways. To counteract the common bias in the interpretation of the Courts in favour of the traditional privilege of employers to dispose of capital freely, it is necessary to perceive distinctly the principles on which a more effective legal instrument to grant employees rights is based. The rest of this chapter will be constructed on the premise, implicit in the social policy of the EC, that legislation for the protection of workers in the case of structural business changes can have a powerful influence; it will explain the principles upon which the law operates and address the challenge which more effective protection of workers' rights poses for considerations of business efficiency.

Legislative intervention for the regulation of business transfers

The regulation of business transfers does not signify a break with the pluralist tradition and may not vest workers with sufficient power to challenge the rights of owners of capital to dispose of it freely.¹⁰⁰ For example, the legislation in the EC does not promote collective bargaining in a meaningful way. It does not deal with the complex legal procedures needed to create and supervise a duty to bargain and which

¹⁰⁰Compare the restriction upon mandatory subjects of bargaining under the National Labor Relations Act sec. 8(a)(5) and 8(d), 29 U.S.C. sec. 158 as interpreted in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

have frustrated the aspirations of American employees.¹⁰¹ In this negative vein, the law does not display great power to alter the social forces of capital and labour. However, the law's particular value is intervention where collective bargaining has failed. The inadequacy of the coverage of collective bargaining intimates that law may have an important and influential role which extends far beyond the confined role which pluralists generally ascribe to it, namely that of promoting collective bargaining. The legislation under discussion provides one example of law introducing an element of industrial justice into the employment relationship.

Hugh Collins has argued that in the modern corporation the power of management derives primarily from the effective exercise of bureaucratic power and that labour law's primary focus must not bear upon market power but must be a review of the exercise of bureaucratic power as a source of domination.¹⁰² While market power "rests on a belief in the legitimacy of entitlements to the fruits of the use of property and skills, ... stable bureaucratic power requires a belief in the legitimacy of the authority exercised through the hierarchical structure."¹⁰³ The exercise of this authority gives rise to most of the regular conflicts at work, which are not necessarily conflicts between employees and the owners of capital, but rather conflicts between employees and management which wields the powers of decision-making. Collins's perspective allows the values of democracy, legality and fairness, advocated in political society, to be introduced in the workplace to replace the practice of domination.

Acceptance of the values of liberal society in the workplace dictates that the autocratic power exercised by management over the workforce should not go unchecked. The most apt method for the control of managerial power is legal regulation and review of private bureaucratic power, on the same principles as judicial review of executive governmental power through administrative law. This function of the law, while recognising that bureaucratic decision-making has to be subject to a measure of control, accepts this form of organisation's legitimacy and value. It is accepted that bureaucratic hierarchies have the advantages of efficiency and rationality; within a bureaucratic power structure problems of co-ordination, supervi-

¹⁰¹P. Davies and M. Freedland, *Labour Law* 202-5 (2d ed. London 1984); P. Weiler, "Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA," 96 Harv. L. Rev. 1769 (1983); C.W. Summers, "Industrial Democracy: America's Unfulfilled Promise," 28 Cleveland State L. Rev. 29 (1979).

¹⁰²Hugh Collins, "Against Abstentionism in Labour Law," in *Oxford Essays in Jurisprudence* 92-93 (John Eekelaar and John Bell eds., Oxford 1987).

¹⁰³*Id.* at 92.

sion, transmission of information and adaptation to changing market circumstances are more easily dealt with.

Control of the exercise of bureaucratic power therefore acknowledges the effectiveness of bureaucratic structures to deal with a variety of problems. Following Collins's suggestion to draw upon the analogy of judicial review in administrative law, control would take place with the object of ensuring that managerial prerogative is exercised "in accordance with the Rule of Law and with fair standards of decision-making."¹⁰⁴ The standards which apply to the exercise of managerial prerogative should accordingly reflect principles of rationality, fairness and respect for individual rights. In introducing such standards, the legislation for the protection of the acquired rights of workers shows its greatest strength.

A better understanding of the nature of the power exercised by management over the workforce makes it possible to see the focal point of acquired rights legislation as control over managerial prerogative. With this focus in mind, it remains to examine the finer points of the applicable standards. Respect for the rights of employees is manifested in several ways: the prohibition against dismissal for reasons of a transfer supports the transfer of acquired rights and demonstrates respect for the dignity of the individual by limiting the grounds for disciplinary action; the requirement of consultation contributes towards a fair procedure. The standard of rationality is reflected in the exemption which allows employers to dismiss employees for economic, technical or organisational reasons which entail changes in the workforce. This permits the exercise of power if the employer can demonstrate that it furthers the economic interests of the enterprise and contributes towards efficiency. As long as the Courts apply a strict criterion of rationality, abuse of power can be prevented. Rationality also relates to the pertinent and controversial question whether acquired rights should be protected in the case of insolvent businesses. The type of rational standards to be applied in situations of insolvency will be discussed.

As much as judicial review of the exercise of managerial prerogative can contribute towards infusing the esteemed values of liberal society into the workplace, it has one serious defect: it is not supported by the kind of democratic structures, such as a democratically elected parliament, which, in Government has final control over acts of the executive. Collective bargaining has hardly lived up to the ideal of democracy since negotiations are conducted in private and do not really provide shop-

¹⁰⁴*Id.* at 96.

floor workers with the opportunity of self-determination. To remedy the lack of democracy in the context of employment, Collins suggests that attention should be paid to existing practices in industrial relations.¹⁰⁵ The final section of this chapter will consider whether the more recent development of consultative committees in large enterprises approaches a more complete standard of democracy.

1. Respect for the rights of employees: automatic transfer of rights and the prohibition against dismissal

The standards which apply to the exercise of managerial prerogative should, first of all, reflect respect for individual rights. The importance of this value derives from the fact that workers have a vital interest in their employment, not only because of the wages or salaries which are needed to support themselves and their families, and the associated benefits which the job often provides, but because of the time that workers spend in the workplace and the defining influence that this has on their personalities and relationships. Business transfers often result in major restructuring of corporate strategy and operations which enhances the value of shareholders' equity but which places great pressure on the labour market and leads to a corrosion of workers' interests. While recognising that the global economic climate places enormous pressure on businesses to cut costs and to increase productivity in order to compete in an intense market environment, there is no reason to accept complete managerial authority as part of the natural order of things. As important as the concerns for maximisation of productivity and efficiency of the overall economy, are the concerns for the immediate and severe distress which the development of corporate strategies can inflict upon workers and their families. Legislation can give some recognition to the interests of these important stakeholders in the firm by safeguarding employees' rights in the event of a transfer.¹⁰⁶ Even though the regulation of transfers, operating within general judicial constraints, will encounter similar problems as other pieces of employment protection legislation, it can offer some level of protection to employees from managerial decisions to effect business changes and afford them some participation in the affairs of the enterprise. It can intervene to some extent to prevent arbitrariness when the corporate firm exercises its

¹⁰⁵*Id.* at 98.

¹⁰⁶This is the aim of the Acquired Rights Directive as explained in *Foreningen af Arbejdsledere i Danmark v. Daddy's Dance Hall A/S*, [1989] 2 C.M.L.R. 517, 524 (E.C.J.).

considerable power of control over the time and activities of human beings, or when a Government effects its policies and operations. Managerial prerogative assumes an unusual meaning when the term is applied to Government practices such as privatisation, but there is no ground for allowing the exercise of power to go unchecked when it results in a substantial deterioration in the terms and conditions of employment of employees.

2. Rationality: economic, technical and organisational reasons for dismissal; Insolvency

The introduction of legal provisions to safeguard acquired rights and terms of employment, while signifying a "major step toward the preservation of workers' rights",¹⁰⁷ might seem easily justifiable in labour law. "After all", Davies asks, "whatever freedom it might be thought the existing controller should appropriately be given to impose unilateral changes in terms and conditions of employment, can there be any sensible argument for giving the new controller a greater freedom?"¹⁰⁸ It does not take a very radical frame of mind to agree with Davies that justice seems to suggest that, whatever balance is struck between employment protection and managerial prerogative, this balance should be maintained when there is a transfer of control. It does not appear reasonable to allow a new controller greater freedom of action than the predecessor in a transfer situation. However, at least two counter-arguments have been raised against this seemingly tenable justification, calling for rational standards to be applied in transfer situations.

One counter-argument suggests that operations like mergers, takeovers or amalgamations should not be unduly burdened and that capital concentrations should not be impeded since they can make an important contribution to the maintenance of employment.¹⁰⁹ A related and strong counter-argument applies in insolvency situations. If the automatic transfer and automatic protection against dismissal provisions are applied in the context of insolvencies, it may cause a transferee to pay less for the transferred undertaking, or not to purchase the undertaking at all, with two

¹⁰⁷Report of the Committee on Social Affairs and Employment (the Yeats Report)(Eur. Parl. Doc. (Com. No. 384) para. 3 (1974)).

¹⁰⁸P.L. Davies, "Acquired Rights, Creditors' Rights, Freedom of Contract, and Industrial Democracy," 9 Y.B. Eur. L. 21, 22 (1989).

¹⁰⁹See the Opinion of the Economic and Social Committee on the proposed Directive, O.J. Eur. Comm. (No. C 155) para. 1.3, 25 (7 November 1975).

possible consequences. First, it may actually be prejudicial to the interests of employees as a whole and lead to "a serious risk of general deterioration in working and living conditions, contrary to the social objectives of the Treaty."¹¹⁰ Second, it may treat employees more favourably than other creditors of the insolvent undertaking. It is possible, as one scholar has pointed out, that creditors will argue that the transferee will pay less for the business as a result of having to take over the acquired rights of employees, thereby diminishing the pool of assets against which the creditors can claim.¹¹¹

The first counter-argument concerning capital mobility and integration can be accommodated in legislation in the form of a provision which allows dismissals for rational business reasons. For example, the EC's Transfers Directive permits "dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce."¹¹² Rationality requires that such an exemption be interpreted in accordance with objective standards which will not destroy the protection of employees' rights unless a clear business need has been established. Accordingly, Courts should be willing to examine an employer's financial position or prospects to determine whether a decision was made for economic reasons, and should not simply accept the employer's subjective judgement.¹¹³ The judicial

¹¹⁰*Abels v. Bestuur van de Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie*, [1985] E.C.R. 469 (E.C.J.) (followed in *Industriebond FNV v. The Netherlands*, [1985] E.C.R. 511 (E.C.J.)); *Arie Botzen v. Rotterdamsche Droogdok Maatschappij BV*, [1985] E.C.R. 519 (E.C.J.), and *Foreningen af Arbejdsledere i Danmark v. A/S Danmols Inventar*, [1985] E.C.R. 2639 (E.C.J.).

¹¹¹P.L. Davies, "Acquired Rights, Creditors' Rights, Freedom of Contract, and Industrial Democracy," 9 Y.B. Eur. L. 21, 23-24 (1989).

¹¹²Art. 4.

¹¹³As yet there is not enough interpretational guidance from the European Court on how to perform the careful balancing which is necessary to prevent the destruction of most of the protective measures of the Directive. The clearest statement from the Court expressed the need to take account of all the objective circumstances in which the dismissal occurred and to determine whether it took place on a date close to that of the transfer (*P. Bork International A/S v. Foreningen af Arbejdsledere i Danmark*, [1989] I.R.L.R. 41, 44 (E.C.J.)). From this fact it would be possible to draw the inference that the dismissal was connected to the transfer and did not take place for economic reasons. The objective standard to which the Court alluded was not clarified sufficiently to allay fears that the exemption may destroy much of the protective aims of the Directive. Decided cases in the UK have not gone much further to restore confidence that the employer's reasons for dismissing employees will be closely scrutinised. Signals from the Employment Appeal Tribunal indicate a reluctant willingness to exercise some control over management prerogative. The tribunal did, in one case, exclude from "economic" reasons dismissals of the workforce for the purpose of disposing of the business, at the insistence of the transferee or to secure a better deal, and confined such reasons to dismissals which arose during the conduct of the business (*Wheeler v. Patel*, [1987] I.C.R. 631 (E.A.T.)). It also stated, in another decision recognising the importance of safeguarding acquired terms and conditions of employment, that an "economic, technical or organisational" reason *necessarily* had to (continued...)

responsibility of striking a fair balance between the promotion of business and the safeguarding of workers' rights can be achieved by emphasising the unfairness of dismissal for a reason connected with the transfer and by not allowing employers' characterisation of their business needs to undermine this valuable protection. Striking a balance generally means that Courts, assigned with the task of reviewing management prerogative, will closely have to scrutinise the scope of employers' freedom to dismiss for reasons of "business efficiency." Fulfillment of this task will not necessarily place undesirable limits on proposed employer initiatives; it will, however, provide employees with their share of industrial justice.¹¹⁴

Rationality can provide some yardstick for striking a balance between the conduct of business and the protection of employees' rights, an exercise which is, under normal circumstances, by no means easy to perform, but which becomes much more arduous under circumstances of business insolvency. The second counter-argument against the protection of employees' rights in the context of insolvencies stresses the dangers which this may hold for the sale of businesses and the continuation of the productive process. Although evidence of such risks is hard to come by, the difficulties which the European Court faced while applying the provisions of the Directive in situations of insolvency give some idea of the complications involved. In the much-criticized *Abels* decision, the European Court limited the application of the Acquired Rights Directive to pre-liquidation procedures which had the object of ensuring continued trading.¹¹⁵ Other insolvency proceedings, instituted with a view to the liquidation of the assets of the transferor under the supervision of a competent judicial authority, were excluded from the scope of the Directive. It has since been confirmed in another decision of the European Court, *D'Urso v. Ercoli Marelli Elettromeccanica Generale SpA*,¹¹⁶ that the Directive does not apply if an

¹¹³(...continued)
entail changes in the function or composition of the workforce and that it was not enough if this was merely an incidental consequence (*Berriman v. Delabole Slate Ltd.*, [1985] I.C.R. 546, 550-1 (E.A.T.)).

¹¹⁴John Bowers and Andrew Clarke, "Unfair Dismissal and Managerial Prerogative: A Study of 'Other Substantial Reason'," 10 Indus. L.J. 34 (1981); John McMullen, "Management Prerogative, Reorganisation and Employees' Rights on Transfers of Undertakings," 49 Mod. L. Rev. 524 (1986).

¹¹⁵*Abels v. Bestuur van de Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie*, [1985] E.C.R. 469 (E.C.J.)(followed in *Industriebond FNV v. The Netherlands*, [1985] E.C.R. 511 (E.C.J.)); *Arie Botzen v. Rotterdamsche Droogdok Maatschappij BV*, [1985] E.C.R. 519 (E.C.J.), and *Foreningen af Arbejdsledere i Danmark v. A/S Danmols Inventar*, [1985] E.C.R. 2639 (E.C.J.).

¹¹⁶[1992] I.R.L.R. 136 (E.C.J.).

insolvent undertaking is placed under a particular insolvency regime for the purpose of liquidation. The reasons for this exclusion included a fear that applying the Directive to insolvent transferors would be prejudicial to employees' interests. In *Abels* the Court mentioned the "serious risk of general deterioration in working and living conditions" which might result if a transferee, faced with the transfer of the acquired rights of employees, decided not to acquire the undertaking.¹¹⁷ However, since there was no conclusive evidence to demonstrate that this risk would materialise, the Court's position remained speculative. It is possible that application of the Directive will not prevent all sales of insolvent businesses and that in many cases employees may benefit from a transfer. Even if it leads to a transferee paying less for the business, the price may be more than the break-up value of the assets and other creditors will be able to claim from this sum.

Based on unstable foundations, the decisions of the European Court present several problems. A particular problem concerns the spurious distinction between insolvency proceedings which aim to ensure continued trading and those which result in liquidation. The first type of procedure, like the latter, may ultimately involve the choice between selling a business as a going concern or selling the assets separately, and the issue of the priority of employees' claims in relation to those of other creditors arises in both situations.¹¹⁸ There thus seems to be no sound basis on which to make the distinction.

In terms of the distinction which the European Court made between different kinds of insolvency proceedings, each situation will have to be decided on the facts. This does not provide a solution to the fundamental problem, however, which is that of formulating clear policy regarding the priority of employees' claims with regard to those of other creditors. The weighing up of the interests of creditors has always been the concern of insolvency law and the European Court was reluctant to interfere with this priority system. But the extent to which it nevertheless did interfere, despite the lack of evidence, has done nothing to clear up the "considerable uncertainty ... regarding the impact on the labour market of transfers of undertakings in the case of an employer's insolvency."¹¹⁹ Interference would probably not have been necessary

¹¹⁷[1985] E.C.R. 469, 485 (E.C.J.).

¹¹⁸P.L. Davies, "Acquired Rights, Creditors' Rights, Freedom of Contract, and Industrial Democracy," 9 Y.B. Eur. L. 21, 23-25, 47 (1989).

¹¹⁹[1985] E.C.R. 469, 485 (E.C.J.).

at all if the European Directive, which deals with the protection of employees in the event of the insolvency of their employer and which mainly concerns the guarantee of employees' outstanding claims by guarantee institutions, provided for adequate financial protection.¹²⁰ At the moment the extent of coverage of this Directive is not satisfactory.

Socialising the costs of employees' claims may be a commendable route to escape from the problems posed by business insolvencies.¹²¹ In addition, one would want to see the results of extensive research into the implications on the labour market of singling out for protection the specific interests of employees in the case of insolvencies. Until the results of such research become available there is insufficient justification to distinguish between different types of insolvencies. Policy considerations apply to all kinds of insolvency situations alike and it would probably be prudent to leave such policy decisions to insolvency law and to restrict the application of legislation for the protection of acquired rights in insolvency situations to employee participation rights and the functions of employee representatives.¹²²

3. Fair procedure: consultation

A legal instrument for the regulation of business transfers, in addition to its protective function, has to incorporate a participatory value, based on the underlying premise that participation has "an essential role in the management of change."¹²³ Participation can take many forms, of which negotiation and consultation appear to be internationally the most common.

Consultation is usually interpreted to mean something less than negotiation with the employer retaining the right to decide, but "consultation with a view to seeking agreement," the form of participation employed in the European Directive, can have considerable force and comes close to negotiation. The requirement that an employer

¹²⁰Council Directive 80/987/EEC of 20 October 1980, O.J. Eur. Comm. (No. L 283) (1980) on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer.

¹²¹P.L. Davies, "Acquired Rights, Creditors' Rights, Freedom of Contract, and Industrial Democracy," 9 Y.B. Eur. L. 21, 53 (1989).

¹²²This was the recommendation of Professor Bob Hepple in his report for the Commission of the European Communities on the *Main Shortcomings and Proposals for Revision of Council Directive 77/187/EEC* (December 1990)(unpublished).

¹²³Bob Hepple, "The Crisis in EEC Labour Law," 16 Indus. L.J. 77, 81 (1987).

should listen to representations from employee representatives has analogies with the administrative law requirement of fair hearing. In both areas of the law recognition is given to the underlying principle that persons affected by certain actions should be afforded a fair and unbiased hearing before the decision to act is taken. "Due process" in both instances serves the purpose of facilitating accurate and informed decision-making.¹²⁴ Consultation invariably contains an important process value and has the important virtue of informing the employer of the various issues and views to which regard ought to be paid.¹²⁵ It is not inconceivable that an employer, though not obliged to do so, will adjust a decision to take account of convincing arguments and proofs. Failure to consult, especially in instances where employees are needlessly retrenched, constitutes an infringement of a very important interest of employees. For this reason it is essential to have clarity on the basic principles involved in the process.

Any variant of the consultative process invariably requires notice of the proposal to be given to the affected parties and their being afforded an opportunity to present their views. Moreover, it is required that the decision-maker should consider those views in good faith, that the decision should not be made for an improper reason and that it should be explained.¹²⁶ Concisely, the process amounts to notice, attention, and explanation,¹²⁷ a minimal set of rights which will be dealt with in turn.

(a) Notice

Those with a right to be consulted have to be given prior notice of the opportunity to make representations. This requirement implies that the time allowed for consultation must be adequate, especially where the issues are complex and their effects far-reaching.¹²⁸ A short period may only be justified in urgent circumstances. Normally, an employer's claim that consultation will delay a decision which has to be taken expeditiously if the employer is not to experience financial loss, will not be

¹²⁴Lawrence Baxter, *Administrative Law* 538 (Cape Town 1984).

¹²⁵*Id.* at 225.

¹²⁶Melvin Aron Eisenberg, "Participation, Responsiveness, and the Consultative Process: an Essay for Lon Fuller," 92 Harv. L. Rev. 410, 415 (1978).

¹²⁷*Id.* at 423.

¹²⁸Allan D. Jergesen, "The Legal Requirements of Consultation," Pub. L. 290, 308 (1978).

sustained. In most instances the assertion is simply untrue that employers cannot foresee redundancy early enough to allow for consultation.¹²⁹ The right to be consulted arises at the formative stage of a proposal before final conclusions have been drawn and minds have become settled.

Notice of consultation has to mention all important subjects to be included in the deliberation. Since it is possible that new details may emerge in the process of consultation as a scheme develops and unfolds, it is desirable to allow for a broad reading of the subjects to be discussed. To be adequate, consultation may have to start at an early stage and take place intermittently as more particulars emerge.

A mere reference to the subjects to be discussed is not sufficient. Those being consulted need information about the subjects put forward for consideration before they can give their views. Access to relevant information, which includes data on which the proposals are based and value judgements influencing the decision,¹³⁰ is so crucial to the consultation process that the employer who withholds information should bear the burden of demonstrating that this did not impair rights of participation.¹³¹

(b) Attention

The nature of consultation bears little resemblance to the art of reasoning or logic. An employer's decision need not follow from the views and arguments of the consulted employees. However, the process requires a receptive attitude, open mindedness and a willingness to consider the advice tendered.¹³² The employer must be susceptible to proofs and other interpretations, and open to suggestions. Evidence of a receptive mind will be found in the way the proceedings are conducted; sufficient opportunity to ask questions, to express opinions and even to exchange views may signify adequate consultation.¹³³

¹²⁹M.S.M. Brassey, E. Cameron, M.H. Cheadle & M.P. Olivier, *The New Labour Law* 91 (Cape Town 1987).

¹³⁰Allan D. Jergesen, "The Legal Requirements of Consultation," Pub. L. 290, 305 (1978).

¹³¹*Id.* at 306.

¹³²*Id.* at 308.

¹³³*Id.* at 309.

(c) **Explanation**

Consultation can be advanced by explanation, which serves the dual function of satisfying employees that the decision is not arbitrary, and confirming that the employer has paid sufficient attention. Although explanation is not critical to meaningful participation,¹³⁴ it can no doubt greatly enhance the process and should only be disregarded in exceptional circumstances. Explanation ensures that a decision is not made for an improper reason, a function which is probably the most demanding and most problematic of the entire consultation process.

Underlying the concept of "improper reason" is the assumption that such a reason can be identified in some kind of objective manner. However, a determination of reasons which may be deemed "proper" or "improper" may entangle a Court in one of the most contentious areas of labour law. The reason for this is that the employer is usually allowed considerable latitude regarding the setting of norms.¹³⁵ Should a Court therefore be able to pronounce on the impropriety of an employer's desire to want to reduce a wage bill? Or should a Court have any say with regard to the costliness or impracticability of abolishing overtime or implementing short time?¹³⁶ Should the employer's judgement be accepted without questioning as the final word on these matters?

It is submitted that a certain amount of interrogation into the employer's reasons and reasoning is not only apposite but is essential to maintain the intrinsic worth of the consultation process. Given this submission, the limits of a Court's interference can best be described with reference to two aspects of the employer's decision-making process: the dialectical and the substantive.¹³⁷ A Court can inquire into the dialectical aspect of the process and can satisfy itself as to the legitimacy of the employer's standards, values and supporting arguments. Once these have been accepted as valid, it is irrelevant whether a Court agrees with the final decision. If the employer appeals to arguments which most people, including, presumably, the

¹³⁴Melvin Aron Eisenberg, "Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller," 92 Harv. L. Rev. 410, 412 (1978).

¹³⁵M.S.M. Brassey, E. Cameron, M.H. Cheadle & M.P. Olivier, *The New Labour Law* 91 (Cape Town 1987).

¹³⁶*Id.* at 91-2.

¹³⁷See Lawrence Baxter, *Administrative Law* 485 (Cape Town 1984) where he distinguishes the two facets of "reasonableness" in relation to administrative actions.

employees, would accept as relevant and worthy of consideration, it is immaterial whether a Court agrees with the substantive outcome. Judging reasons not to be "improper" does not necessarily imply that a Court identifies or disagrees with the employer's views.¹³⁸

Applied to concrete situations, a dialectical inquiry looks into the relevant and legitimate reasons for a decision. A Court's interference relates to the process of decision-making and it can demand that the employer's reasons be comprehensive enough to be recognized as legitimate, even if it would not have come to the same conclusion as the employer. If reasons are not sufficient to determine their legitimacy there is room for judicial scrutiny. A Court may, for example, demand evidence in support of a simple statement from the employer that a certain practice would have been too costly or impracticable, in order to make sure that such statements are not fabrications to conceal reasons which are generally recognized to be improper. An investigation into the reasons for termination, for example, enables a Court to satisfy itself that redundancy was the bona fide ground for termination. If retrenchments could have been avoided or diminished through the implementation of alternative measures, the reason for the termination is not valid. Part of the investigation will therefore be for a Court to determine whether the employer has considered alternatives and, if such alternatives are capable of implementation, whether the employer has instituted them.¹³⁹ Without second-guessing policies which flow from the employer's personal and distinct knowledge and expertise, a Court's intervention acts as a safeguard against arbitrariness and hypocrisy, and indirectly as a protection of the consultation process.

There is a particular reason why a Court should be allowed to adjudge the dialectical aspect of decision-making in the field of labour relations. Generally, consultation as an administrative procedure is based on trust -- trust that an administrative authority will "act fairly if well informed, or that persistent substantive unfairness can and will be corrected by processes other than substantive judicial review, such as public criticism or removal from office."¹⁴⁰ A firm belief that an

¹³⁸*Id.* at 486.

¹³⁹M.S.M. Brassey, E. Cameron, M.H. Cheadle & M.P. Olivier, *The New Labour Law* 123 (Cape Town 1987).

¹⁴⁰Melvin Aron Eisenberg, "Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller," 92 Harv. L.R. 410, 417 (1978).

employer can be relied upon to act fairly can hardly be expected in circumstances giving rise to retrenchment, when the employees' interests are directly opposed to those of management. Moreover, the corrective democratic processes which operate with regard to public authorities have little role to play in the industrial environment and the employer's decision-making power and decision-making process are usually only subject to the check of collective action. At a time when an employer intends to dispense with workers, strike action will neither necessarily inflict economic damage on an employer, nor will it always serve as an inhibiting factor. It is therefore important to allow for Court intervention when an employer fails adequately to discharge its duty to consult, and to guard against narrow judicial interpretations from Courts which do not appreciate the full value of the participatory process and render legislation ineffective.

In the UK, for example, the law's contribution towards a fair procedure while potentially deep, has not yet been very effective. Positive legal underpinning to maintain something approaching a fair balance of power between capital and organised labour has not proved very effective. One reason for the ineffectiveness of the consultation provisions regarding both transfers and redundancies, has to do with the lopsided emphasis which legislators and Courts have given to business interests, and the failure to recognise the importance of the review of the exercise of bureaucratic power. A partisan interpretation of the Transfers Directive has given recognition only to the aim to facilitate capital concentrations;¹⁴¹ a similar bias with regard to the redundancy payments legislation highlights that it was designed partly to facilitate redundancy decisions by inducing employees to accept such decisions as a necessary concomitant of industrial change.¹⁴² The familiar tug of war between the interests of capital concentrations and those of employees -- two concerns which the European Community's Social Action Program was intended to address -- have generally resulted in a defeat for the latter, mainly because of a fear that employees might be able to impede the process of capital growth if they are allowed a more significant input in decision-making.¹⁴³ Ironically, aims of business efficiency are not

¹⁴¹P.L. Davies, "Acquired Rights, Creditors' Rights, Freedom of Contract, and Industrial Democracy," 9 Y.B. Eur. L. 21, 27 (1989).

¹⁴²R.H. Fryer, "Redundancy and Public Policy," in *Redundancy and Paternalist Capitalism: A study in the sociology of work* 216-60 (R. Martin and R.H. Fryer eds., London 1973).

¹⁴³P.L. Davies, "Acquired Rights, Creditors' Rights, Freedom of Contract, and Industrial Democracy," 9 Y.B. Eur. L. 21, 27 (1989).

necessarily defeated by the procedural requirement of consultation, but consultation can actually contribute towards efficiency in that it gives rise to more informed decision-making. Efficiency requires a process of gathering all relevant information, not least from the employees who work daily in the enterprise and who are most closely connected and affected by the decision. However, in the final analysis, justification for the procedural requirement of consultation is not based on considerations of business efficiency, but rests on respect for individual dignity.¹⁴⁴ This moral standard requires that an employer should not be allowed to implement a decision before the completion of a fair procedure, and the whole process should be subject to review by Labour Courts.

4. Democracy

An indication of how the value of democracy might be realised in the context of employment can be gained from looking at existing practices in industrial relations, which show some similarities in all three countries under discussion. In South Africa, bargaining mostly occurs within the framework of the Labour Relations Act,¹⁴⁵ which provides for three statutory bargaining forums: Industrial Councils, Conciliation Boards and Works Councils. The latter institutions, despite their obvious democratic features, are largely inoperative because of the legacy of their unfortunate racist past. Prior to 1979, when black workers were excluded from the general statutory bargaining system, they were allowed to negotiate wages and terms of employment with individual employers at plant level through so-called liaison and works committees.¹⁴⁶ Such committees, which were usually initiated and dominated by management, were under those circumstances regarded with suspicion by workers. Under the present statutory regime, the shadows from the era of racially exclusive legislation still linger on and works councils have never become viable institutions.¹⁴⁷

¹⁴⁴Hugh Collins, "Against Abstentionism in Labour Law," in *Oxford Essays in Jurisprudence* 97 (John Eekelaar and John Bell eds., Oxford 1987).

¹⁴⁵Act 28 of 1956.

¹⁴⁶In terms of the Black Labour Relations Regulation Act 48 of 1953, as amended by Act 84 of 1977. The Black Labour Relations Regulation Act was repealed by the Labour Relations Amendment Act 57 of 1981.

¹⁴⁷Sec. 34A of the Labour Relations Act provides for works councils consisting of equal numbers of employer and employee representatives, which "shall perform such functions as may be agreed upon by the employer and employees concerned." Agreements can be enforced in ordinary Courts as contracts, or in the Industrial Court in terms of its unfair labour practice jurisdiction.

However, a fair amount of bargaining takes place outside the statutory framework, when private arrangements are formalised in recognition agreements, a type of common law contract. In addition, the growth of informal liaison committees has generally been encouraged, unless they were set up by the employer as substitute bodies to exclude trade unions from the bargaining process in an effort to avoid bargaining altogether.¹⁴⁸

Informal liaison between employers and employees, which has emerged in a variety of shapes at different times in different nations, is occurring to an increasing extent in American businesses, as employers have devised innovative programs of direct worker participation.¹⁴⁹ The principal aim is to introduce a form of worker participation which will be sensitive to the circumstances of the specific plant or firm, flexible to adjust to changed circumstances, and will provide both sides of the relationship with greater mutual benefits. Ideally, employee involvement plans should provide for a cooperative relationship which leads to improved efficiency for business, as management is able to make use of the insights and ingenuity of the workforce, and to an increased sense of accomplishment and satisfaction for workers, as they contribute actively to the success of the business. Although this view of a more flexible employment relationship represents a somewhat romanticised model of self-government, collegiality and collaboration, there are examples of worker participation schemes which suggest that new models of representation are workable.¹⁵⁰ Most forms of worker participation take place within the framework of a collective bargaining relationship, which leads one to believe that, if added to the fundamental value of collective bargaining for American workers, joint worker-management committees can be suitable avenues through which the moral aspiration of democratising the workplace can be achieved. At the moment the law prohibits many forms of

¹⁴⁸See *NUM v. Buffelsfontein Gold Mining Co.*, (1991) 12 I.L.J. 346 (I.C.).

¹⁴⁹A catalogue of different modes of employee involvement plans can be found in Thomas C. Kohler, "Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)," 27 B.C.L. Rev. 499, 500-513 (1986) and Thomas A. Kochan, Harry C. Katz, and Nancy R. Mower, *Worker Participation and American Unions: Threat or Opportunity?* (Kalamazoo, Mich.: W.E. Upjohn Institute 1984).

¹⁵⁰The scheme that has been most prominent resulted from the UAW-General Motors agreement for the Saturn Project. For a critical discussion of the implications of this agreement see Harry C. Katz, "Automobiles," in *Collective Bargaining in American Industry: Contemporary Perspectives and Future Directions* 13, 41-48 (David B. Lipsky and Clifford B. Donn eds., Lexington, Massachusetts 1987).

participatory management initiated and promoted by management,¹⁵¹ but the developing trends in industry and the potential advantage for both employers and employees, indicate an urgent need for legal reform. It has been argued that the statutory ban on employee involvement plans designed by enlightened management should be removed as part of a broad legislative review of the NLRA, which also reaffirms the value of collective bargaining for all employees.¹⁵²

Without general statutory support for joint consultation and little prospect that the UK Government will relax its opposition to the draft "Vredeling" Directive on procedures for informing and consulting employees, the practice is not foreign to the shop floor of many businesses in the UK. The spontaneous development of consultation procedures has not unequivocally been to the advantage of employees as a result of the peculiar relationship between collective bargaining and consultation in British enterprises. These do not constitute two separate channels of communication to the extent that they do on the Continent, but there is an amount of overlap and consultation procedures can be described as an "adjunct to the institutions of collective bargaining."¹⁵³ While this arrangement provides flexibility, it has distinct advantages for the employer. With no formal requirements for consultation, the employer has a discretion over the timing and scope of disclosure of information and consultation, and the tendency has developed in Britain "for control to be centralised and new techniques employed to make use of union involvement to legitimise managerial ... decisions."¹⁵⁴ Generally, issues which are subject to consultation concern those over which the employer wants to retain strategic control, but for which employees' co-operation is required. Consultation is the preferred procedure to avoid

¹⁵¹Sec. 8(a)(2) makes it an unfair labour practice for an employer to "dominate or interfere with the formation or administration of any labour organisation or to contribute financial or other support to it." In turn, a labour organisation is defined by sec. 2(5) as including "any organisation of any kind or ... employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning ... conditions of work." The aim was to ensure that all possible incidents of employer involvement in the representation of employee interests would be prohibited.

¹⁵²Paul C. Weiler, *Governing the Workplace* 217-218 (Cambridge, Massachusetts 1990). Weiler makes the argument that both analytically and empirically, union representation and employee involvement are not mutually exclusive paths to the long-range goal of labour law: to enhance labour participation as much as worker protection.

¹⁵³W.W. Daniel and Neil Millward, *Workplace Industrial Relations* (The DE/PSI/ESRC Survey) 135, 140 (London 1983).

¹⁵⁴Steven Anderman, "Unfair Dismissals and Redundancy," in *Labour Law in Britain* 445 (Roy Lewis ed., Oxford 1986).

unacceptable levels of conflict within the management process, but informal consultation procedures have not consistently enhanced workers' influence over methods of production and the direction of the enterprise, and their co-existence with collective bargaining has not invariably expanded the base of workers' control.

However, it can be argued that the phenomenon of voluntary joint consultation indicates common consent for a legal duty to consult.¹⁵⁵ Keeping in mind the dangers of informal consultation, it is important to pay attention to studies which have shown that regular consultation with workers through consultation committees leads to an increase in productivity, probably as a result of the enhanced satisfaction which workers get from participation in decision-making and a greater sense of self-determination.¹⁵⁶ Legal support for consultative groups can extend the practice in industry, create more opportunities for self-determination, and generate mutual benefits. Employees' performance can be assisted through a diminished sense of domination within the organisation, while the business organisation can benefit from a better flow of information; both can profit from the infusion of democracy in industry.

Conclusion

The claim that law can make a difference, both to enhance labour participation as well as worker protection, will be substantiated by detailed case studies of the legal position concerning the protection of workers in the case of business transfers in the USA, UK and South Africa. The exposition in the next chapters may to a certain extent reinforce the scepticism of those who think that even in-depth legal reform will show only marginal payoffs: after all, workers in the three countries with different legal regimes have not enjoyed substantially different rights. However, the adoption of legislation for the protection of workers in the case of business transfers in the UK, and amendments to make it more effective, hold considerable promise that the law can advance the strong moral claim that workers should have respected rights and some meaningful voice about the exercise of managerial power when this has a far-reaching impact on their stake in the undertaking, and on a host of other issues in their lives. When the particulars of different legal systems are considered, it is necessary to keep

¹⁵⁵W.W. Daniel and Neil Millward, *Workplace Industrial Relations; the DE/PSI/ESRC survey* Chap. 6 (London 1983).

¹⁵⁶Hugh Collins, "Against Abstentionism in Labour Law," in *Oxford Essays in Jurisprudence* 98 (John Eekelaar and John Bell eds., Oxford 1987), quoting S. Lukes, *Essays in Social Theory* Ch. 4 (New York 1977); R. Blauner, *Alienation and Freedom: The Factory Worker and his Industry* (Chicago 1964).

in mind the deeper political values which could justify legal reform to secure for workers protective and participatory functions.

CHAPTER 2

THE PROTECTION OF WORKERS IN THE CASE OF BUSINESS TRANSFERS: UNITED STATES OF AMERICA

Introduction

Employer power has a special significance for the vast majority of employees in the United States. The majority of employment relationships are not covered by collective bargaining agreements,¹ and operate under an age-old rule that employers "may dismiss their employees at will ... for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong."² With the exception of employees in the civil service,³ and employees who fall under certain "protected" categories,⁴ statutory protection against discharge is lacking. Acceptance of the employer's absolute right of discharge places employees in a particularly vulnerable position with regard to private establishments upon which they usually depend for their livelihood.

Employment-at-will

A misplaced rule of mutuality of obligation, which ignores the fundamental inequality in the employment relationship, has since the end of the previous century justified the right of arbitrary dismissal. The reasoning is that if an employee can quit a job at any time, the employer must have a similar right to terminate the relationship for any or no reason.⁵ Ordinarily employees do not have the leverage to negotiate

¹Since practically all collective bargaining agreements provide that no employee in the bargaining unit may be discharged except for "just" cause, workers covered by such an agreement are removed from the operation of the common-law rule.

²*Payne v. Western & A. R.R.*, 81 Tenn. 507, 519-20 (1884), overruled on other grounds, *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915). The rule was apparently first asserted by H.G. Wood in his treatise on master and servant law without support from the cases which he cited. Horace G. Wood, *A Treatise on the Law of Master and Servant* (Albany, New York 1877).

³These include employees in federal, state and local government. Federal employees, e.g., are protected by Government Organization and Employees Act, 5 U.S.C. sec. 7512(a) (1976), which permits dismissal only "for such cause as will promote the efficiency of service."

⁴These categories have been created by the National Labor Relations Act of 1935, 29 U.S.C. secs. 151-68 (1976), and the Civil Rights Act of 1964, 42 U.S.C. sec. 2000e (1976), in the form of impermissible reasons for dismissal relating to discrimination or reprisals of various kinds.

⁵See *Adair v. U.S.*, 208 U.S. 161, 174-75 (1908).

a contract for a fixed term with an employer and they therefore have to rely on the whim of the employer for preservation of their employment.⁶ The arbitrary right to "hire and fire" still appears to be the accepted norm, in the absence of a statute or contract to the contrary.⁷ However, slowly and almost unobtrusively, in an increasing number of states, the ideas of dismissal for cause and greater job security have started to appear in Court decisions which allow employees successfully to challenge the termination of their employment.

A 1959 California decision marked the beginning of the erosion of the theoretical prerogative of an employer to dismiss an employee for any or no reason. In *Petermann v. International Brotherhood of Teamsters*⁸ a former business agent of the union brought a suit for wrongful discharge alleging that he had been fired for a refusal to commit perjury. The Court recognised that the right to discharge might be limited by considerations of public policy and said: "It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute."⁹ After *Petermann* it became easier for Courts to accept the existence of exceptions to the employment at will rule, particularly "where some recogni[s]ed facet of public policy is threatened,"¹⁰ and in a few cases Courts have gone so far as to reformulate the rule for wrongful discharge. The New Hampshire Supreme Court stated in 1974 in *Monge v. Beebe Rubber Company* that "[C]ourts cannot ignore the new climate prevailing generally in the relationship of

⁶Only those employees whose knowledge or talents are exceptionally valuable may be able to negotiate such contracts with their employer.

⁷See generally, Lawrence E. Blades, "Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power," 67 Colum. L. Rev. 1404 (1967); Donald H.J. Hermann & Yvonne S. Sor, "Property Rights in One's Job: The Case for Limiting Employment-At-Will," 24 Ariz. L. Rev. 763 (1982); Jay M. Feinman, "The Development of the Employment at Will Rule," 20 Am. J. Legal Hist. 118 (1976); Sanford M. Jacoby, "The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis," 5 Comp. Lab. L. 85 (1982); Theodore J. St. Antoine, "You're Fired," 10 Hum. Rts. 32 (1982); Samuel Estreicher, "Unjust Dismissal Laws: Some Cautionary Notes," 33 Am. J. Comp. L. 310 (1985).

⁸*Petermann v. International Brotherhood of Teamsters*, 344 P. 2d 25 (Cal. App. 1959).

⁹*Id.* at 27.

¹⁰*Geary v. U.S. Steel Corp.*, 319 A. 2d 174, 180 (Pa. 1974). See also *Jackson v. Minidoka Irrigation District*, 563 P. 2d 54, 57 (Idaho 1977): "As a general exception to the rule allowing either the employer or the employee to terminate the employment relationship without cause, an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy."

employer and employee" and, on this basis, justified a departure from the rule by which the "employer has long ruled the workplace with an iron hand."¹¹ The Court inquired into the "proper balance" between the interests of employers, employees and the public, and found that a termination by an employer of a contract of employment which is motivated by bad faith or malice or based on retaliation constituted a breach of the employment contract. The *Monge* case was referred to by the Massachusetts Supreme Judicial Court when it had to decide whether an employment contract was breached by a bad-faith termination. In *Fortune v. National Cash Register*¹² the Court held that the written contract contained an implied covenant of good faith and fair dealing, and found that a termination not made in good faith constituted a breach of contract.

The good faith limitation on the employer's right to discharge was supplemented by a more positive assertion of a right in one's job when the Michigan Supreme Court found such a right on both express and implied contract terms. In *Toussaint v. Blue Cross & Blue Shield of Michigan*¹³ an employee who was hired in middle management was handed a personnel manual that stated it was company "policy" to dismiss employees "for just cause only." When the employee was dismissed five years later and brought suit against the employer alleging that his employment contract permitted dismissal only for just cause, the Court accepted that such protection may become part of the contract "as a result of an employee's legitimate expectations grounded in an employer's policy statement."¹⁴ The Court seemingly took a great leap forward when it affirmed the need for judicial review of the propriety of the discharge where the employer had promised to discharge for just cause only.¹⁵ And yet there are important qualifications to this decision. A Court will not be able to read the requirement of "just cause" dismissal into the employment contract where an employer refrains from making any declarations regarding the reasons for termination. In the end the legal standard of "just cause," even in the most reasonable state Courts, needs proof of special circumstances. These extreme cases

¹¹*Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551 (1974).

¹²*Fortune v. National Cash Register*, 364 N.E. 2d 1251 (Mass. 1977).

¹³*Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980).

¹⁴408 Mich. 579, 598, 292 N.W.2d 880, 885 (1980).

¹⁵408 Mich. 579, 621, 292 N.W.2d 880, 895 (1980).

have not altered the norm that most private employers can rid themselves of an unwanted employee without any need to explain the cause for the dismissal.

Full and effective protection against unjust dismissal is likely to result only from specialised legislation. A statutory solution, although not without problems, is accepted in most of the industrial world as the best available means to vindicate employees' rights by providing protection against unjust dismissal.¹⁶ In the United States, ironically, the concern for civil liberties has largely ignored the threat of employer power to the individual freedom of employees, and the law has not intervened to stop the abuse of the unorganised worker. Workers are expected to carry the burden of capitalist crises while employers are allowed to minimise the costs of dismissal for themselves. The consequences have been harsh, ever since it was observed decades ago that

"[w]e have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security ... For our generation, the substance of life is in another man's hands."¹⁷

Through collective bargaining labour unions have in a small measure addressed the imbalance in the employer/employee relationship, but their sphere of influence is shrinking, and, as will be pointed out in the next section, has been limited in various ways to protect employees from employer power.

Insolvency

Workers' interests are recognised to some extent in American bankruptcy laws.¹⁸ Bankruptcy proceedings may involve the liquidation of a debtor and distribution of its assets to creditors (Chapter 7), or the reorganisation of the debtor for continuing operations (Chapter 11). During such proceedings areas of great concern to workers include the priority of creditors' claims,¹⁹ and the rejection of

¹⁶The International Labour Organization recommended in 1963 that there should be a "valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements [of the employer]." (Recommendation No. 119, 1963.)

¹⁷F. Tannenbaum, *A Philosophy of Labor* 9 (New York 1951), quoted in Blades, "Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power," 67 Colum. L. Rev. 1404 (1967).

¹⁸Bankruptcy Code, 11 U.S.C. sec. 101 (Supp. III 1985).

¹⁹Such claims include wage and pension claims. See sec. 507(a) of the Code.

collective bargaining agreements.²⁰

Statutory priorities determine the allocation of assets for the payment of unsecured claims upon liquidation or reorganisation (with limited exceptions).²¹ Where assets are insufficient for the payment of all unsecured claims, the priorities effectively determine which claims will be paid. Workers' claims are given the following priorities: wages for services rendered after the commencement of the case (first priority); wages, including vacation, severance and sick leave pay,²² earned in the 90 days prior to the commencement of the case up to a certain maximum (third priority); contributions to employee benefit plans arising from service rendered in the 180 days prior to the commencement of the case up to a certain limit (fourth priority).²³

The controversial treatment of collective bargaining agreements in bankruptcy proceedings has displayed the distinct tension between the object of national labour relations law to encourage collective bargaining, and the aim of bankruptcy law to rehabilitate overburdened debtors.²⁴ The controversy originates from the provision which allows the bankruptcy trustee to reject, with Court approval, any executory contract of the debtor.²⁵ This provision conflicts with a provision in the NLRA which makes unilateral rejection of a collective bargaining agreement an unfair labour

²⁰Sec. 365 (as affected by sec. 1113) of the Code.

²¹11 U.S.C. sec. 507(b) (1982). A reorganisation plan may not be approved unless each claimant receives consideration with a present value at least equal to the amount the claimant would receive in liquidation under Chapter 7 (11 U.S.C. sec. 1129 (1982)).

²²Questions arise when such payments are made after the commencement of proceedings based on the length of employment including pre-bankruptcy service. See Phillip I. Blumberg, "United States Report" (Symposium on the Protection of Workers' Rights in the Event of Insolvency and Business Reorganization), 5 Conn. J. Int'l L. 7, 11 (1989).

²³From this amount is deducted the aggregate amount paid to such persons under the third priority, plus the amount paid by the debtor's estate for the benefit of such employees under another benefit plan. Pension benefits present complex problems which fall outside the scope of this study, particularly, the statutory obligations imposed by the Employee Retirement Income Security Act of 1978 (ERISA), 29 U.S.C. sec. 1001 (1982), a particularly complex statute.

²⁴See, e.g., Rosalind Rosenberg, "Bankruptcy and the Collective Bargaining Agreement - A Brief Lesson in the Use of the Constitutional System of Checks and Balances," 58 Am. Bankr. L.J. 293 (1984); T. Haggard & M. Pulliam, *Conflicts Between Labor Legislation and Bankruptcy Law* (Philadelphia 1987)(Industrial Research Unit, Wharton School, University of Pennsylvania); Raymond N. Hulser, "The Rejection of Collective Bargaining Agreements in Chapter 11 Reorganisations: The Need for Informed Judicial Decisions," 134 U. Pa. L. Rev. 1235 (1986); John Vian, "The Rejection of Collective Bargaining Agreements Since the 1984 Amendments: The Case Law under the New Bankruptcy Code sec. 1113," 91 Com. L.J. 252 (1986).

²⁵Sec. 365 of the Code.

practice.²⁶ In the *Bildisco* case, the Supreme Court by a narrow margin, accepted a standard favouring the debtor to be applied when Courts decide that an unexpired collective bargaining agreement can be rejected.²⁷ It held that the collective agreement can be rejected if it "burdens" the debtor's estate, and if a balancing of the equities favours rejection. The Court accepted the conditions that the employer must have made reasonable efforts to renegotiate the agreement and show that such efforts "are not likely to produce a prompt and satisfactory conclusion."²⁸

In response to *Bildisco*, Congress moved to protect the provisions of a collective bargaining agreement, and enacted a restriction on a debtor's ability to reject it.²⁹ The statutory amendments introduced some element of participation in the decision-making process: a debtor has to make a proposal to the union which provides for "necessary modifications in the employees' benefits and protections that are necessary to permit the reorganisation of the debtor and assuring that all creditors, the debtor and all affected parties are treated fairly and equitably;"³⁰ the debtor must supply relevant information necessary to evaluate the proposal; finally, the debtor must confer in good faith in an attempt to reach mutually satisfactory modifications of the agreement. A Court can approve rejection if it finds that a union has refused to accept a proposal without "good cause," and that the "balance of equities clearly favors rejection."³¹ Even though the legislative provisions recognise labour's legitimate voice and the value of collective agreements, the threat which reorganisation proceedings holds for collectively bargained provisions has not disappeared, and remains a factor which influences the balance in employment relations.

²⁶29 U.S.C. sec. 158(d) (1982).

²⁷*NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

²⁸*Id.* at 525-526.

²⁹11 U.S.C. sec. 1113 (Supp. III 1985).

³⁰To determine "necessary" modifications, Courts have applied two standards. A stringent standard which considers the short-term objective of preventing liquidation regards "necessary" as synonymous with "essential." See *Wheeling Pittsburgh Corp. v. United Steel Workers of America*, 791 F.2d 1074 (3d Cir. 1986). Another standard which has been applied is more concerned with the long-term financial condition of the debtor. See *Truck Drivers Local 807, Int'l Bhd. of Teamsters v. Carey Transportation, Inc.*, 816 F.2d 82 (2d Cir. 1987).

³¹Sec. 1113(e) also provides that, during the period in which an agreement continues in effect, a Court may authorise interim changes in an agreement with regard to wages, benefits and protections if it is essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate.

Obligations of the transferor

1. Collective bargaining theory

Introduction

In the United States, unionised workers enjoy little protection in the event of a transfer. The law gives employers a broad "managerial prerogative" and workers are not regarded as parties to enterprise decision-making. The collective bargaining framework within which unions operate limits union input and excludes meaningful participation in decisions which may vitally affect employees. As a consequence, corporate investment decisions leave unions unable to protect the employment opportunities of their members. Among unions there is a feeling of frustration with current labour law and with the fact that the labour movement cannot deal effectively with the corporate world, mobility of capital and investment decisions.³² Capital mobility, changes in corporate structure and workers' demands for participation challenge the prevailing interpretation of labour laws and the viability of collective bargaining.

Collective bargaining and the Wagner Act

The form of collective bargaining which has become the dominant mode of labour dispute resolution is rooted in the National Labour Relations Act (NLRA)³³ which grants workers the right to bargain collectively over "wages, hours and other terms and conditions of employment."³⁴ Section 8(a)(5) of the NLRA renders an employer's failure to bargain in good faith with the exclusive representative of its employees an unfair labour practice.³⁵

The stated policy of Congress with the passing of the Wagner Act was to reduce industrial conflict and to safeguard commerce by "restoring equality of

³²See Anthony Mazzocchi, former Vice President of the Oil, Chemical and Atomic Workers International Union, "Changing Economic Realities and the Changing Role of Unions," 11 N.Y.U. Rev. of L. & Soc. Change 7, 25 (1983).

³³29 U.S.C. secs. 151-169 (1982)

³⁴29 U.S.C. sec. 158(d) (1982).

³⁵29 U.S.C. sec. 158(a)(5) (1982).

bargaining power between employers and employees."³⁶ Aggregations of economic power on the side of employees were created, countervailing the existing power of corporations to establish labour standards.³⁷ The primary purpose was to give employees an effective voice, through collective bargaining, in determining the terms and conditions of their employment.³⁸ Industrial democracy was central to the rationale for unionisation and remained the most widely accepted justification for legal protection of unions.³⁹ For Senator Wagner, the denial or observance of the right to bargain collectively meant the difference between despotism and democracy.⁴⁰ He explained the principles underlying the requirement that the employer should be required to recognise and bargain with a union as follows:

"They were founded upon the accepted facts that we must have democracy in industry as well as in government; that democracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood; and that the workers in our great mass production industries can enjoy this participation only if allowed to organise and bargain collectively through representatives of their own choosing."⁴¹

Collective bargaining as a means of participation centres around the duty to bargain, the "performance of the mutual obligation of the employer and the representative of employees to meet at reasonable times and confer in good faith"⁴² with respect to certain topics. However, the legislative history of the NLRA was ambiguous and vague regarding many particulars of the collective bargaining relationship⁴³ including the topics of bargaining which are described as "wages, hours, and other terms and conditions of employment." Throughout the history of the NLRA there has been considerable controversy about which decisions are subject to the duty to

³⁶NLRA sec. 1, 29 U.S.C. sec. 151 (1982).

³⁷Archibald Cox, "The Duty to Bargain in Good Faith," 71 Harv. L. Rev. 1407 (1958).

³⁸Clyde W. Summers, "Industrial Democracy: America's Unfulfilled Promise," 28 Clev. St. L. Rev. 29, 34 (1979).

³⁹B. Meltzer, *Labor Law: Cases, Materials & Problems* 1117-18 (2d ed. Boston 1977).

⁴⁰Christopher L. Tomlins, *The State and the Unions. Labor Relations, Law and the Organized Labor Movement in America, 1880-1960* 106 (Cambridge 1985).

⁴¹M. Derber, *The American Idea of Industrial Democracy, 1865-1965* 321 (Urbana 1970)(Citing N.Y. Times, April 13, 1937, at 20, col. 1).

⁴²NLRA sec. 8(d), 29 U.S.C. sec. 158(d) (1982).

⁴³Archibald Cox, "The Duty to Bargain in Good Faith," 71 Harv. L. Rev. 1401, 1406 (1958)(with the passing of the Wagner Act, no one attributed much significance to the imposition of a duty to bargain collectively because it seemed doubtful whether so vague a duty could be enforced).

bargain and the scope of bargaining has "long been a major battleground between management and labour."⁴⁴ The ambiguity of section 8(a)(5) suggests that it may not be possible to identify the "perspective" from which legislation is enacted and to apply the "perspective" to particular facts, without extra-statutory values and assumptions inevitably contributing towards the result.⁴⁵ One commentator remarked that the Act was "profoundly ambivalent" and that it could be made to yield a number of interpretations more or less consistent with a certain set of values and assumptions.⁴⁶

The values and assumptions which have influenced the law in the area of business transfers can best be described by looking at the pluralist model of management-labour relations. Against the background of this model judicial decisions can be examined for the form and content which have been attributed to the relationship between collective bargaining and management control. Moreover, the pluralist model can provide for an evaluation and assessment of the scope and function of collective bargaining as well as the extent and form of management control in the workplace.⁴⁷ In the discussion which follows it will become clear how pluralist values and assumptions find expression in collective bargaining law and influence the nature of the relationship and the degree of shared decision-making between the parties.

2. Application of collective bargaining theory in general

Categories of bargaining

In spite of the symbolic voluntarism associated with collective bargaining it is evident that there are limits on the subject matters deemed suitable for shared decision-making through the collective bargaining process. Only "legitimate interests"

⁴⁴Peter E. Millspaugh, "Plant Closings and the Prospects for a Judicial Response," 8 J. Corp. L. 483, 487 (1983).

⁴⁵See Paul N. Cox, "Ruminations on Statutory Interpretation in the Burger Court," 19 Val. U. L. Rev. 287 (1984).

⁴⁶Paul N. Cox, "On Debunking Labor Law Doctrine: A Review of James Atleson's Values and Assumptions in American Labor Law," 1 Utah L. Rev. 101, 105 (1985). See also Archibald Cox and John T. Dunlop, "Regulation of Collective Bargaining by the National Labor Relations Board," 63 Harv. L. Rev. 389, 391 (1950) with regard to the ambiguity of secs. 8(a)(5) and 9(a).

⁴⁷See Andrew Goldsmith, "The Management-Control Collective Bargaining Relationship: Three Models," 24 Osgoode Hall L.J. 775, 776 (1986) (models can have descriptive and normative significance).

may be subject to negotiation by the parties⁴⁸ and, although this can effectively negate the mutuality of decision-making, it supports the pluralist view of limited legitimate workplace conflict. By protecting a particular zone of permissive subjects it is suggested that bargaining over certain issues may be costly or futile and unlikely to serve the overall industrial welfare.⁴⁹

The clearest doctrinal manifestation that management and labour are not really co-equal parties, together formulating the rules of their joint governance, is the distinction in American labour law between "mandatory" and "permissive" subjects of collective bargaining. The distinction is based upon the NLRA's compulsion of good faith bargaining with regard to "wages, hours, and other terms and conditions of employment."⁵⁰ In *NLRB v. Wooster Div. of Borg-Warner Corp.*⁵¹ the Court held that the terms of the statute indicated mandatory subjects about which an employer and union must bargain in good faith. Either party may insist on its position with regard to these subjects and back it with the use of economic force. After bargaining to impasse with regard to mandatory subjects, that is, after the parties have exhausted the avenues of bargaining, an employer may unilaterally implement pre-impasse offers or proposals. In the case of all subjects not covered by the statutory terms, the so called permissive subjects, the law forbids insistence to impasse and the use of economic force.⁵² This means that an employer can act unilaterally without bargaining and the union cannot strike to protest the action.

The distinction between mandatory and permissive subjects of bargaining results in limiting the participation of employees in collective negotiations to establish working conditions. Many decisions which imperil or destroy the job security of

⁴⁸R. Hyman, "Pluralism, Procedural Consensus and Collective Bargaining," 16 Brit. J. Indus. Rel. 16, 33 (1978).

⁴⁹See, e.g., *Brooks Scanlon, Inc.*, 246 NLRB 4766 (1979). See also *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678 (1981).

⁵⁰NLRA sec. 8(a)(5) and 8(d), 29 U.S.C. sec. 158(a)(5) and 158(d)(1982). Sec. 8(d) was added to the NLRA in 1947 by the Labor-Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. sec. 141 et seq. (1982). Congress rejected an attempt to confine collective bargaining to a narrow list of statutory subjects and delegated the task of defining "terms and conditions" to the National Labour Relations Board and the Courts. See H.R. Rep. No. 245, 80th Cong., 1st Sess. 49, 71 (1947), reprinted in 1 NLRB, *Legislative History of the Labor-Management Relations Act, 1947* (Washington D.C. 1948).

⁵¹*NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

⁵²See generally R.Gorman, *Basic Text on Labor Law: Unionization and Collective Bargaining* 496-98 (St. Paul 1976).

employees are solely for management⁵³ and there is no sure way to draw the dividing line between exclusive management prerogatives and subjects concerning wages, hours and conditions. Crucial subjects of industrial governance such as corporate transformations and capital investment and disinvestment decisions may be more important to employees than wages or hours of work. Nevertheless, Courts have held that most of these decisions are beyond the scope of employee participation through collective bargaining and are vested in the exclusive discretion of management.⁵⁴ Employers are immunised from bargaining and the threat of work stoppage over permissive subjects such as plant closures,⁵⁵ the sale of part or all of the enterprise,⁵⁶ or joining a conglomerate.⁵⁷

The dichotomy between mandatory and permissive subjects of bargaining reflects a belief that there is some untouchable core of entrepreneurial sovereignty that is beyond the reach of compulsory collective bargaining.⁵⁸ It suggests that employees have not been accepted as full partners in the enterprise⁵⁹ and that those with property rights -- that is, employers -- can exercise them as they see fit. Contrary to the pluralist model's apparent support of an equivalence of bargaining power and the joint authorship of rules, the reality shows an asymmetrical power relationship between management and employees in which employee participation is limited.⁶⁰

The scope of participation is still narrower than the mandatory subjects would suggest. Although a subject is a "term and condition of employment" an employer can bargain for a "management prerogatives" clause which gives the employer unilateral

⁵³*Fibreboard v. NLRB*, 379 U.S. 203, 220 (1964) (Stewart, J., concurring).

⁵⁴See the discussion of *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964) and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) below.

⁵⁵*Royal Typewriter Co. v. NLRB*, 533 F.2d 1030 (8th Cir. 1976); cf. *Brockway Motor Trucks v. NLRB*, 582 F.2d 720 (3rd Cir. 1978) (plant closing held not to be a mandatory subject of bargaining).

⁵⁶*United Auto Workers v. NLRB*, 470 F.2d 422 (D.C.Cir. 1972).

⁵⁷*I.A.M. v. Northeast Airlines, Inc.*, 473 F.2d 549 (1st Cir.), cert. denied, 409 U.S. 845 (1972).

⁵⁸Theodore J. St. Antoine, "Federal Regulation of the Workplace in the Next Half Century," *Chi.-Kent L. Rev.* 631, 645 (1985).

⁵⁹Clyde W. Summers, "Industrial Democracy: America's Unfulfilled Promise," 28 *Clev. St. L. Rev.* 29, 41 (1979).

⁶⁰Karl E. Klare, "The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law," 61 *Or. L. Rev.* 157, 171 (1982).

control over certain working conditions during the contract term.⁶¹ Even management rights clauses which are so broad that they would leave employees under a collective agreement "in no better state than they were without it" have been held to be proper.⁶² The employer can lock out the employees until the union agrees to a management rights clause and in this way uses its economic strength to limit participation to an area smaller than that described by the statute.⁶³ The union, however, cannot use its economic strength to expand the area of participation beyond that described by the statute.⁶⁴

The distinction between mandatory and permissive bargaining subjects has implications for an employer's right to initiate unilateral changes in operations without satisfying the bargaining obligation. Under the rule formulated in *NLRB v. Katz*,⁶⁵ unilateral action with respect to a mandatory subject is a per se violation of the duty to bargain because it "directly obstructs or inhibits the actual process of discussion...."⁶⁶ The Court believed that unilateral changes, without notice to the union and an opportunity to bargain about them, were so disruptive of orderly negotiations as to constitute a refusal to confer at all.⁶⁷ Permissive subjects do not qualify for the same protection. In *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co., Chemical Division*⁶⁸ the Supreme Court held that, since health insurance benefits for retired workers was a permissive subject of bargaining with the union representing current workers, the employer was not obliged to maintain such benefits,

⁶¹*NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 409-10 (1952).

⁶²*White v. NLRB*, 255 F.2d 564 (5th Cir. 1958). But see *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 135 (1st Cir. 1953) (held improper where the employer did not "make some reasonable effort in some direction").

⁶³Clyde W. Summers, "Worker Participation in the US and West Germany: A Comparison from an American Perspective," 28 *Amer. J. Comp. L.* 367, 382 (1980).

⁶⁴*Id.* at 382.

⁶⁵*NLRB v. Katz*, 369 U.S. 736 (1962).

⁶⁶*Id.* at 747.

⁶⁷The *Katz* case involved a unilateral change in working conditions which took the form of a grant of new benefits but the employer has also been held to violate its duty to bargain when employees were deprived of benefits already in existence. See, e.g., *Molders Local 155 v. NLRB (United States Pipe & Foundry Co.)*, 442 F.2d 742 (D.C. Cir. 1971).

⁶⁸*Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co., Chemical Division*, 404 U.S. 157 (1971).

even while the parties' contract was still operative.⁶⁹ The employer is therefore free to modify existing terms or practices on non-mandatory subjects without negotiating with the union or securing its consent. A basic question raised by the distinction between mandatory and permissive subjects is the extent to which Courts were authorised to intervene in negotiations between employers and unions. Pluralist collective bargaining theory places much emphasis on the *private* character of negotiations which result in a compromise among legitimately conflicting interests. The strategies and relative bargaining strengths of the private parties determine the final compromise and government is supposed to play a minimal role in regulating the negotiation process as such. It has been stated repeatedly that the basic theory of the National Labour Relations Act was that "the arrangement of substantive terms and conditions of employment was a private responsibility from which the government should stand apart."⁷⁰

Pluralist explanations of the relationship between private negotiation and public intervention are not without contradictions. For example, Bok and Dunlop insist that the nature of the institution of collective bargaining is chiefly shaped by the parties themselves⁷¹ and go on to add that the collective bargaining process defines the subjects to be settled by collective bargaining. At the same time they have to admit that the law in the United States defines the subjects that must be bargained about. They explain this contradiction in terms of the function of law to respond to strains and to contain antagonisms within reasonable bounds. Underlying this explanation is an idea of industrial peace which is biased towards the preservation of employer interests. Bok and Dunlop, displaying a fear that employers will be made too vulnerable to the will of labour unions, claim that the employer has to be protected from a bargaining

⁶⁹*Id.* at 186-88. The repudiation or modification of a contract term which constitutes a permissive subject of bargaining may, however, be a breach of contract for which the injured party might have another remedy, such as a suit for damages. See *Pittsburgh Plate Glass*, 404 U.S. at 186-87 ("[o]nce parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board").

⁷⁰A. Cox, D. Bok & R. Gorman, *Labor Law: Cases & Materials* 84 (8th ed. Mineola, New York 1977); see also Archibald Cox, "The Right to Engage In Concerted Activity," 26 Ind. L. J. 319, 322-23 (1951). The classic statement of this view is the oft-repeated quotation from the legislative history of the Wagner Act: When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, "Here they are, the legal representatives of your employees". What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.

⁷⁹ Cong. Rec. 7660 (1935)(statement of Senator Walsh).

⁷¹Derek C. Bok and John T. Dunlop, *Labor and the American Community* 226 (New York 1970).

process which "reaches into the details of his business, seeking to regulate every aspect of working conditions in his plant."⁷²

The pluralist theory maintains an extraordinary balance between the "private" and "public" aspects of industrial decision-making. While insisting upon the private, semi-autonomous character of the industrial relations system, activism by the judiciary is regarded as necessary to serve the public interest in industrial peace. More concealed is the fact that judicial intervention supports existing relations of production and management practices.⁷³ Within this framework workers are effectively denied participation in the development and implementation of important industrial strategies.

The complex justification for the public/private distinction serves to lead the focus away from an important perspective of the role of law in the labour market. As Professor Summers has shown, the posture of government neutrality is a departure from the Congressional goal of affirmatively encouraging collective bargaining.⁷⁴ Collective bargaining was a "private process constructed to serve public purposes", namely the promotion of industrial democracy and the equalisation of bargaining power.⁷⁵ In terms of these social claims, the legal rules developed by the Courts to circumscribe the concepts of mandatory and permissive bargaining do not express or implement the premises and purposes of the statute. On the contrary, these rules lead to a disparagement of the collective bargaining process.

Effect

With regard to permissive subjects of bargaining which impact on employee wages, hours, terms and conditions of employment, an employer is required to bargain with the union over the effects of the decision.⁷⁶ Effects-bargaining focuses on a decision's impact on the workforce and encompasses matters such as transfer

⁷²*Id.* at 213.

⁷³In this sense private autonomy is maximized and individual entitlements are protected to the same extent as under a common law regime. See Professor Epstein's plea for the scrapping of labour legislation in favour of the adoption of a common law regime relying upon tort and contract law. Richard A. Epstein, "A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation," 92 Yale L.J. 1357 (1983).

⁷⁴Clyde W. Summers, "Past Premises, Present Failures, and Future Needs in Labor Legislation," 31 Buffalo L. Rev. 9, 17 (1982).

⁷⁵*Id.* at 13.

⁷⁶See, e.g., *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3rd Cir. 1965); *General Motors Corp. v. NLRB*, 470 F.2d 422 (D.C. Cir. 1972); *NLRB v. Adams Dairy*, 350 F.2d 108 (8th Cir. 1965)

rights to other jobs or locations, retraining, severance pay, seniority, retirement and medical benefits. Effects-bargaining, unlike decision-bargaining, is concerned solely with the effects of employer decisions on the welfare of employees and does not bring into question the prudence of the employer's decision.⁷⁷ Under effects-bargaining the union cannot require management to consider union-suggested alternatives to the decision itself.⁷⁸

The effects-bargaining duty places some burdens on the employer. To lend force to effects-bargaining, the Act has been interpreted to require the employer to provide "reasonable and timely notice"⁷⁹ and to produce data and information relevant to its decision.⁸⁰ The problem is, however, that the employer's decision is treated as a *fait accompli* and that a duty to bargain over effects attaches only after the decision has already been made.⁸¹ Strikes over the effects of managerial decisions are recognized as lawful, protected activity.⁸² However, a union will often not be inclined to use its economic weapons during bargaining over the effects of a decision, since a strike would have little impact, for example where workers withhold labour at a time when the employer plans to cease giving them work. The union will not be able to inflict economic damage on the employer and it is unlikely that the employer will make concessions on the effects of the closure.⁸³ Where decisions such as terminations impact harshly on workers' lives, effects-bargaining will do little to make the change more palatable. In one case, the Board has acknowledged that "[t]he effects are so inextricably interwoven with the decision itself that bargaining limited to effects will not be meaningful if it must be carried on within a framework of

⁷⁷See R. Swift, *NLRB and Managerial Decision-Making* 4-5 (The Wharton School Industrial Relations Unit, University of Pennsylvania, Labor Relations & Public Policy Series, Rep. No. 9, 1974).

⁷⁸*Id.* at 5.

⁷⁹See, e.g., *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961); *NLRB v. Aluminum Tubular Corp.*, 299 F.2d 595 (2d Cir. 1962).

⁸⁰See, e.g., *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967).

⁸¹*NLRB v. National Car Rental Sys.*, 672 F.2d 1182, 1188 (3d Cir. 1982).

⁸²A union has a right to bargain to impasse and strike over a mandatory subject of bargaining.

⁸³Janice R. Bellace, "Employment Protection in the EEC," 20 *Stan. J. Int'l Law* 413, 415 n. 13 (1985). Professor Bellace notes that statutory rights available to European workers far exceed the level of protection afforded to workers in the U.S. under the duty to bargain over the effects of a decision. *Id.* at 416.

a decision which cannot be revised."⁸⁴

Disclosure

As part of the duty to bargain in good faith, the Board and the Courts have required the employer to provide the union with information relating to mandatory subjects of bargaining. Wage or wage-related data are presumed to be relevant to the union's functions as collective bargaining agent and the employer cannot raise a defence of confidentiality.⁸⁵ However, the Supreme Court has rejected a rule which would automatically result in a finding of bad-faith bargaining whenever the employer rejects a request for relevant information and has declared that such a finding turns upon the "circumstances of the particular case."⁸⁶

With regard to information other than wage or wage-related data, the union has a burden to prove the information's relevance to a mandatory subject of collective bargaining.⁸⁷ Information beyond the scope of the presumption of relevance includes management-related information such as production costs, market prospects, or the profitability of the firm.⁸⁸ Unless the employer relies on this kind of information to justify its bargaining position,⁸⁹ requests for management-related data are generally denied on the ground that such data is not necessary for "intelligent bargaining."⁹⁰ There is no detailed analysis of this concept, but the approach of the Board and the Courts indicates acceptance of management's claim for a need to conduct business

⁸⁴*Ozark Trailers, Inc.*, 161 NLRB 561, 570 (1966).

⁸⁵*Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 754 (6th cir. 1963), *cert. denied*, 376 U.S. 971 (1964).

⁸⁶*NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149, 153 (1956). In certain circumstances an employer can therefore avoid the duty to disclose by showing, for example, that the information is of minimal value to the union. See, e.g., *NLRB v. Clegg*, 304 F.2d 168, 176 (8th Cir. 1962).

⁸⁷*Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3d Cir. 1964).

⁸⁸Leslie K. Shedlin, "Regulation of Disclosure of Economic and Financial Data and the Impact on the American System of Labor-Management Relations," 41 Ohio St. L.J. 441, 445-50 (1980).

⁸⁹*NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149, 151 (1956).

⁹⁰Leslie K. Shedlin, "Regulation of Disclosure of Economic and Financial Data and the Impact on the American System of Labor-Management Relations," 41 Ohio St. L.J. 441, 451 (1980) *quoting Teleprompter Corp. v. NLRB*, 570 F.2d 4, 8-9 (1st Cir. 1977); *United Furniture Workers v. NLRB*, 388 F.2d 880, 883 (4th Cir. 1967); *International Woodworkers v. NLRB*, 263 F.2d 483, 485 (D.C. Cir. 1959).

free from union interference. Since the Supreme Court decision in *Detroit Edison*⁹¹ the employer defence of confidentiality has been accepted more widely. To accommodate the company's interest in maintaining the security of a test for promotion selection, the Court held that the company had a legitimate interest in refusing to disclose test questions. In this case the Court took the further step to try to determine alternative means to provide the union with the requested data while still protecting the employer's interests and ordered that the test questions of the aptitude test be released solely to a psychologist and not directly to the union.

In the US employees have access to reports which employers are required to file with government agencies such as the Securities and Exchange Commission, the Office of Federal Contract Compliance Programmes and the Occupational Safety and Health Administration. In terms of the Freedom of Information Act any record within the control of a federal agency is accessible upon the request of any person.⁹² However, the information which can be gleaned from these reports is usually not enough to give unions a picture of the company's plans and the situation has not been improved by the legal constraints upon the duty to disclose. The considerations that have defined the scope of the duty to disclose, like the dichotomy between mandatory and permissive subjects of bargaining, reflect a management prerogatives rationale. By restricting the scope of information in this way, there is little consideration of potential benefits of a freer flow of information such as the possibility that access to information can promote rational and informed decision-making. Unions need information to form an informed and realistic appraisal of the situation and to bargain for the most suitable allocation of available resources.⁹³ True mutuality of interest and meaningful participation by employees can only develop when employees have enough information on the viability of the enterprise to consider the security of both the workers and the plant.

⁹¹*Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

⁹²The Freedom of Information Act was enacted in 1966 (and amended in 1974 and 1976) as a portion of the Administrative Procedure Act of 1946, 5 U.S.C. sec. 551 et seq. (1976).

⁹³Leslie K. Shedlin, "Regulation of Disclosure of Economic and Financial Data and the Impact on the American System of Labor-Management Relations," 41 Ohio St. L.J. 441, 452 (1980).

3. Application of collective bargaining theory - business transfers

Type of transaction

Transfers of business,⁹⁴ like other changes which affect the structure of a business, may have harsh results for employees such as transferring, replacing or reducing the number of employees. Transfers and other company reorganisations such as subcontracting of bargaining unit work to be performed off the premises, complete or partial closures or plant relocations may threaten employee job security or working conditions. The ultimate concern in all cases regarding structural changes in business is to find a balance between an employer's right to manage a business against the effects of employer decisions upon employees.

While Courts have on occasion limited their holdings to a specific type of management decision,⁹⁵ the categories are often not clear and the Board and Courts have run into difficulties in attempts to define the boundaries of a particular business change.⁹⁶ Where Courts have limited their holdings to specific situations, the proposed standards often reach a much broader range of cases involving "management decisions that have a substantial impact on the continued availability of employment...."⁹⁷ Categorisation is often difficult because many transactions contain elements of subcontracting, relocations, liquidations or closures in addition to mergers or consolidations.⁹⁸

Considerable disagreement remains as to the extent to which certain employer

⁹⁴Transfer can occur through merger, sale of assets, loss of a renewable contract, incorporation of a formerly unincorporated entity, dissolution, bankruptcy and lease. See Jonathan F. Silver, "Reflections on the Obligations of a Successor Employer," 2 Cardozo L. Rev. 545 (1981).

⁹⁵See *NLRB v. First National Maintenance Corp.*, 452 U.S. 666, 686 n. 22 (1981)(in deciding a case involving a partial closing decision, the Court stated that "[i]n this opinion we of course intimate no view as to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts").

⁹⁶See, e.g., *Bob's Big Boy Family Restaurants*, 264 NLRB 1369, 1371 (1982), where an employer decided to shut down its shrimp preparation department, lay off its shrimp-processing employees, and purchase shrimp processed by a food supplier. The majority of the NLRB found the employer's action to be a subcontract whereas the dissent thought it was a partial shut-down.

⁹⁷*First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 676 (1981).

⁹⁸ The difficulty in distinguishing between various types of transformations has been noted in, e.g., *Howard Johnson Co. v. Detroit Local Joint Exec. Board*, 417 U.S. 249, 257 (1974) citing *Golden State Bottling Co.*, 414 U.S. 168, 182-3 n. 5 (1973). The Court stated that "ordinarily there is no basis for distinguishing among mergers, consolidations or purchases of assets in the analysis of successorship problems...". *Fall River Dyeing and Finishing Corp.*, 107 S.Ct. 2225, 2234 (1987) referred to the "wide variety of corporate transformations possible."

actions constitute unlawful conduct.⁹⁹ For this reason, an employer's bargaining duty in the case of business transfers will be considered against Board and Court decisions which concern an employer's bargaining duties with respect to a variety of substantial business transformations.

Duty to bargain

Fibreboard Paper Products Corp.

In one of the first cases to consider the closure of two facilities and subcontracting of the operations, the NLRB stated categorically that an employer may "change his business structure, sell or contract a portion of his operations or make any like change" without consultation with the employees' representative.¹⁰⁰ Following this decision, the Board in *Fibreboard Paper Products Corp.* concluded that bargaining was not required with regard to an "economically motivated decision to subcontract maintenance operations."¹⁰¹ This view was reconsidered in *Town and Country Manufacturing Co.*,¹⁰² after which the Board reversed its initial holding in *Fibreboard* and held that the employer's economic decision to subcontract unit work was a mandatory subject of bargaining under section 8(a)(5).¹⁰³ The NLRB ordered the employer to resume the maintenance operation, reinstate the employees laid off, and fulfill its statutory obligation to bargain. The decision was affirmed by the Supreme Court, although confined to the particular circumstances presented in the case.¹⁰⁴

In *Fibreboard* the employer subcontracted maintenance work previously performed by bargaining unit employees, replacing them with workers of an

⁹⁹See Michael C. Harper, "Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining," 68 Va. L. Rev. 1447 (1982); B. Murphy, "Plant Relocation and the Collective Bargaining Obligation," 59 N.C.L. Rev. 5 (1980).

¹⁰⁰*Mahoning Mining Co.*, 61 NLRB 792 (1945).

¹⁰¹*Fibreboard Paper Products Corp.*, 130 NLRB 1558 (1961), *reversed*, 138 NLRB 550 (1962), *enforced*, 322 F.2d 411 (D.C. Cir. 1963), *affirmed*, 379 U.S. 203 (1964). The Board initially found an employer's unilateral subcontracting not mandatory because the subcontract replaced all employees in the bargaining unit. The Board explained that the decision was "not concerned with the conditions of employment of employees within an existing bargaining unit; it involves, rather, the question whether the employment relationship still exists". The Board's decision placed the duty to bargain in the hands of employers who can avoid the duty by replacing a whole bargaining unit.

¹⁰²*Town and Country Manufacturing Co.*, 136 NLRB 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963).

¹⁰³138 NLRB 550 (1962), *enforced*, 322 F.2d 411 (D.C. Cir. 1963).

¹⁰⁴379 U.S. 203 (1964).

independent contractor. The Supreme Court held that subcontracting was a matter of "vital concern" to management and labour and therefore a mandatory subject of bargaining. In reaching its conclusion the Court looked at industrial bargaining practices and found that experience illustrated that subcontracting had been brought "widely and successfully within the collective bargaining framework."¹⁰⁵ While the Court's approach seemed to create an expandable, flexible and adaptable standard to fit an evolving system of collective bargaining,¹⁰⁶ the Court emphasised that its decision was not intended to expand the scope of mandatory bargaining. The company's decision to subcontract the maintenance work did not alter the company's basic approach or involve capital investment. Under these circumstances the bargaining requirement "would not significantly abridge [the employer's] freedom to manage his business."¹⁰⁷ The Court expressly stated that this ultimate test for determining whether an issue was mandatory would not lead to the same result in "other forms of ... subcontracting which arise daily in our complex economy."¹⁰⁸ Justice Stewart, in an influential concurring opinion, reiterated that subcontracting decisions were not as a general rule subject to the mandatory duty to bargain. He acknowledged that various issues of job security traditionally required bargaining, but regarded managerial decisions which lie at the core of entrepreneurial control as falling outside the scope of the requirement.¹⁰⁹ Among the decisions which he viewed as the prerogatives of private business management were those concerning "the commitment of investment capital and the basic scope of the enterprise."¹¹⁰

In contrast to the result reached in this case, imposing on management the duty to bargain over a subcontracting decision, the rationale used by both the majority and concurrence in arriving at that result considered the importance of preserving managerial freedom in accordance with the purpose of the Act. The majority referred to the Act's purpose of promoting industrial peace through negotiation,¹¹¹ but limited

¹⁰⁵*Id.* at 203.

¹⁰⁶Clyde W. Summers, "Labor Law in the Supreme Court: 1964 Term," 75 *Yale L.J.* 59, 62 (1965).

¹⁰⁷379 U.S. at 213.

¹⁰⁸*Id.* at 215.

¹⁰⁹*Id.* at 222.

¹¹⁰*Id.* at 223.

¹¹¹*Id.* at 223.

negotiation to matters which would leave the freedom to manage the business untouched.¹¹² Similarly, the concurrence expressly held that the Act was not intended to give union a voice in issues involving prerogatives of management and explained this conclusion as follows:

"That path would mark a sharp departure from the traditional principles of a free enterprise economy. Whether we should follow it is, within constitutional limitations, for Congress to choose. But it is a path which Congress certainly did not choose when it enacted the Taft-Hartley Act."¹¹³

The *Fibreboard* case, far from envisaging greater participation for organised labour, preserved management's freedom to run the business enterprise.

Darlington Manufacturing Co.

After *Fibreboard* the boundaries of managerial freedom remained elusive. Drawing distinctions between decisions affecting job security that did not significantly abridge the freedom to manage and decisions involving a basic alteration of capital investment was difficult. The concept of managerial freedom formed the basis for the Court's decision in *Darlington Manufacturing Co.*¹¹⁴ Although the case did not deal primarily with a violation of an employer's bargaining duty, but with the discriminatory discharge of employees to discourage membership in a labour organisation,¹¹⁵ it can be argued that the Supreme Court's decision has been of importance in relation to the duty to bargain over plant closures. Following a union victory at a textile mill, the board of directors decided to dissolve the corporation, liquidate its assets and close the plant. The union filed charges against the corporation alleging unlawful discrimination¹¹⁶ and a refusal to bargain.¹¹⁷ *Darlington* argued that as an employer it had an absolute right to "go out of business for whatever reason it may choose, and regardless of whether union animosity may have contributed to the

¹¹²*Id.* at 213.

¹¹³*Id.* at 225-6.

¹¹⁴*Darlington Manufacturing Co.*, 139 NLRB 241 (1962), *enforcement denied*, 325 F.2d 682 (4th Cir. 1963), *vacated and remanded*, 380 U.S. 263 (1965).

¹¹⁵29 U.S.C. sec. 158(a)(3) makes this an unfair labour practice.

¹¹⁶Under sec. 8(a)(1) and 8(a)(3).

¹¹⁷Under sec. 8(a)(5). This charge was predicated upon a violation of sec. 8(a)(3).

decision."¹¹⁸ This proposition was accepted by the Court of Appeals for the Fourth Circuit: "To go out of business in toto, or to discontinue it in part permanently at any time, we think was Darlington's absolute prerogative."¹¹⁹

The Supreme Court adopted a similar approach to an employer's property right: "an employer has the absolute right to terminate his entire business for any reason he pleases"¹²⁰ and rejected the proposition "that a single businessman cannot choose to go out of business if he wants to."¹²¹ In finding that the closure of an entire business was not an unfair labour practice even if the liquidation was motivated by vindictiveness towards the union, the Court took into account that the action yielded no future benefit for the employer.¹²² However, a partial closure is proscribed if it is motivated by a purpose to impair unionism in any of the remaining plants of a single employer and the employer may reasonably have foreseen that the closure would be likely to have that effect.¹²³

Not only is the decision to close a plant because of anti-union animus not an unfair labour practice, according to the Supreme Court in *Darlington*, but an employer is also not required to bargain concerning a purely business decision to terminate his enterprise. This seems to be the most likely construction of a rather vague statement by the Court regarding the duty to bargain¹²⁴ and after the decision in *First National Maintenance Corp. v. NLRB*¹²⁵ the only possible interpretation.¹²⁶

¹¹⁸139 NLRB at 245.

¹¹⁹325 F.2d at 685.

¹²⁰380 U.S. at 268.

¹²¹*Id.* at 270.

¹²²*Id.* at 271-2.

¹²³*Id.* at 274-5.

¹²⁴The Court referred to the Board's finding that Darlington's failure to bargain was a violation of the Act and continued: "Such finding was in part based upon the determination that the plant closing was an unfair labor practice, and no argument is made that section 8(a)(5) requires an employer to bargain concerning a purely business decision to terminate his enterprise." 380 U.S. at 267 n. 5.

¹²⁵452 U.S. 666 (1981).

¹²⁶It can be argued that since the reasoning in *First National Maintenance* pertaining to partial closures applies with even greater force to decisions resulting in the complete closure of a facility, decision-bargaining in complete closure situations will not be required.

First National Maintenance Corp.

In *First National Maintenance* the discontinuation of part of a business was held not to be part of the terms and conditions of employment which required bargaining.¹²⁷ First National Maintenance Corporation discontinued its maintenance operations at one site, which resulted in the dismissal of a significant number of employees. The corporation contended that since the decision was economically motivated, it was not required to bargain. The Supreme Court agreed. In support of this conclusion the Court cited the basic policy underlying the NLRA, namely "the establishment and maintenance of industrial peace to preserve the flow of interstate commerce", primarily through "the promotion of collective bargaining as a method of diffusing and channeling conflict between labour and management."¹²⁸ The Court accepted the pluralist assumption that there is a public interest common to a plurality of interest groups within a society¹²⁹ and stated that "the concept of mandatory bargaining is premised on the belief that collective discussions will result in decisions that are better for both management and labour and for society as a whole."¹³⁰ It is interesting to consider the Court's decision against the background of the basic pluralist perspective which it adopted initially. A careful analysis of the reasoning reveals the basic paradox which occurs regularly in the pluralist perspective, resulting in a restrictive approach towards collective bargaining.

The demand that the interests of all the parties be served through collective bargaining required, according to the Court, that the subject proposed for discussion had to be "amenable to resolution through the bargaining process."¹³¹ Underlying this requirement is the suggestion that collective bargaining should occur only in those instances where a widespread basic consensus exists which may yield to a compromise. Where the interests of the parties diverge to the extent that their mutual concerns or common pursuit are not immediately obvious, union interests have to surrender to accommodate managerial prerogative. The Court in *First National*

¹²⁷452 U.S. 666, 686 (1981).

¹²⁸*Id.* at 686.

¹²⁹See A.Flanders and H.A. Clegg, *The System of Industrial Relations in Great Britain* 318, 322 (Oxford 1954).

¹³⁰452 U.S. 666, 678 (1981).

¹³¹452 U.S. 666, 678 (1981).

Maintenance gave paramount importance to an employer's need to operate freely in deciding whether to shut down part of its business. Justice Blackmun accepted the prerogatives over industrial change that employers enjoyed at common law without giving sufficient explanation why employee statutory rights must yield to them.¹³²

The worst possible outcome of negotiations within a pluralist framework is that the agenda of collective bargaining will be tilted so favourably towards employer interests that the little weight granted to employee interests will allow workers no room to operate or to command any power. When this repressive result is imposed from outside by the Court on the parties' collective bargaining relationship, as was the case in *First National Maintenance*, even the illusion which unions may have of being treated fairly can no longer be maintained.¹³³ The Court based its rationale upon a balancing test which was explained in the following terms:

"[I]n view of an employer's need for unencumbered decision making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labour-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business."¹³⁴

Applying this test to an economically-motivated decision to shut down part of a business, the Court found that the harm which an employer was likely to suffer from a mandatory bargaining duty, outweighed the "incremental benefit" of union participation in making the decision.

The balancing of interests in *First National Maintenance* took place with the scales tilted heavily towards employer interests.¹³⁵ Labour's interest in job security was mentioned¹³⁶ but the Court argued that it was adequately protected by

¹³²The origins of the concept of entrepreneurial property rights have been traced back to the late nineteenth century. Haggai Hurvitz, "American Labor Law and the Doctrine of Entrepreneurial Property Rights: Boycotts, Courts, and the Juridical Reorientation of 1886-1895," 8 Ind. Rel. L. J. 307 (1986). See also H. Wellington, *Labor and the Legal Process* 87 (New York 1968) ("the theory [of management prerogative] is a modern day rationalization of the views of the judges in the conspiracy cases. As such, it has been rejected by the theories...and the policy goals of the Labor-Management Relations Act").

¹³³See Derek C. Bok and John T. Dunlop, *Labor and the American Community* 223 (New York 1970) ("the sense of participation through bargaining serves to mitigate the fear of exploitation on the part of the workers").

¹³⁴452 U.S. 666, 679 (1981).

¹³⁵The asymmetries involved in the Court's bargaining test have been convincingly revealed in Richard Litvin, "Fearful Asymmetry: Employee Free Choice and Employer Profitability in *First National Maintenance*," 58 Ind. L.J. 433 (1983). Professor Litvin pointed out that the test, as articulated and applied, counted the burden of mandatory bargaining on management twice.

¹³⁶452 U.S. 666, 681-82 (1981).

mandatory effects-bargaining and by permissive decision-bargaining.¹³⁷ The possibility that unions could make helpful suggestions which could result in delaying or halting the closure was acknowledged, but the Court indicated that it was unlikely that decision-bargaining, in addition to effects-bargaining would augment the flow of information and suggestions.¹³⁸ In sum, the Court showed a reluctance to consider any benefits to labour that would result from mandatory bargaining and insisted that such benefits would accrue without enforcing the statutory requirement to bargain.¹³⁹

In considering the burdens of mandatory bargaining on management, the Court was concerned that the union's use of economic weapon's could thwart a closure, should mandatory bargaining be imposed¹⁴⁰ thereby forgetting that strikes may in any event occur as incidents of effects-bargaining. More important, the characterisation of strikes as a burden on management disregards the statutory collective bargaining framework which rests on the premise that parties may resort to economic weapons to protect their perceived self-interest.¹⁴¹ A central principle of the NLRA is the right of employees to engage in concerted activity to protect their mutual interests.¹⁴²

Other burdens on management which the Court included in the bargaining test contributed further to the insulation of managerial interests at the expense of employee rights. These burdens were phrased in broad terms and applied by the Court without careful consideration of the facts and regardless of limitations or exceptions. In sweeping language, the Supreme Court significantly limited the class of mandatory subjects, leaving some of an employer's most crucial decisions beyond the reach of the union's power to compel bargaining. According to the Court, a bargaining requirement would unduly burden the conduct of a business where management needed "speed, flexibility and secrecy in meeting business opportunities and exigencies" or where economic factors other than labour costs contributed significantly

¹³⁷*Id.* at 677 n. 15.

¹³⁸*Id.* at 681.

¹³⁹*Id.* at 681 n.19.

¹⁴⁰*Id.* at 681.

¹⁴¹*See NLRB v. Insurance Agents' Int'l Union* 361 U.S. 477, 488-89, 495 (1960).

¹⁴²"Employees shall have the right...to engage in...concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. sec. 157 (1982).

to the decision to close.¹⁴³ The Court's solicitude with regard to management's need for speed and secrecy is not supported by the facts in *First National Maintenance* since the decision to terminate cleaning and maintenance services did not require secrecy, and costly delays from bargaining were unlikely.¹⁴⁴ The danger is that the Court has created a precedent whereby employers, by using the maxim of "speed, flexibility and secrecy" will be able to avoid bargaining and preclude a careful scrutiny of the facts.¹⁴⁵

The same danger lurks in the Court's statement that bargaining would unduly burden management where economic factors other than labour costs contributed to a decision to close. Immediate economic constraints which are beyond the union's power to influence may render bargaining futile. However, the factual determination of instances of futile bargaining is very important. If employees can make concessions sufficient to prevent a closure, bargaining should not be precluded.¹⁴⁶ A conclusion that bargaining would be futile should be made only in extreme cases after careful consideration of the facts and with due deference to the statutory commitment to collective bargaining as a means of communication over "problems of vital concern to labour and management."¹⁴⁷

The application of the broad standards set by the Court in *First National Maintenance* in diverse circumstances has led to a narrowing of the scope of mandatory bargaining and the erosion of crucial bargaining rights. A good example of the restrictive application of the standards to the facts of a particular case can be found in the leading case of *Otis Elevator Co.*¹⁴⁸ in which the NLRB split three ways.

¹⁴³452 U.S. 666, 682 (1981).

¹⁴⁴In Note, "The Supreme Court, 1980 Term," 95 Harv. L. Rev. 91, 334 n. 33 (1981) it is pointed out that FNM's financial difficulties did not arise suddenly. It could have given sufficient advance notice to the union to avoid costly delays caused by bargaining. Moreover, even if bargaining delayed the closing FNM stood to lose only a relatively small amount compared to the loss of jobs by employees.

¹⁴⁵K. Van Wezel Stone, "Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities," 55 U. Chi. L. Rev. 73, 94 (1988) argues that mandatory bargaining after *First National Maintenance* will be determined by an employer's characterization of the reasons for its decisions and therefore by the employer's subjective state.

¹⁴⁶See Note, "The Supreme Court, 1980 Term," 95 Harv. L. Rev. 91, 338 n. 55 (1981) for the suggestion that concessions by the union might have solved FNM's economic difficulties. See also Note, "Mandatory Bargaining and the Disposition of Closed Plants," 95 Harv. L.R. 1896, 1904 (1981) regarding substantial concessions offered by multiplant unions.

¹⁴⁷*Fibreboard Paper Products Corp.*, 379 U.S. 203, 211 (1964).

¹⁴⁸*Otis Elevator Co.*, 269 NLRB 891 (1984).

The majority stated that a determination of a decision as a mandatory subject of bargaining depended on "whether it turns upon a change in the nature or direction of the business or turns upon labour costs". However, it was suggested that even if labour costs were "an important factor" in an employer's decision, bargaining would not be required if the decision "turn[ed] upon a significant change in the nature or direction of a business."¹⁴⁹ In a separate concurring opinion NLRB Member Dennis maintained a two-phase analysis, consisting of a determination of amenability to collective bargaining and a balancing test. According to her, a decision was "amenable to resolution through the collective bargaining process if the employer's decision was motivated by any factor over which the union has control."¹⁵⁰ If the decision is amenable to the bargaining process, the balancing test of the Supreme Court in *First National Maintenance* is applied. This means in effect that the mandatory nature of a management decision is determined by the employer's reasons for the decision.¹⁵¹ NLRB Member Zimmerman's opinion held out slightly more hope for unions. He argued for a broader notion of "amenability" which would be based on an employer's overall costs, not merely labour costs.¹⁵² According to him, should a decision be amenable to bargaining, then the benefits outweigh the burdens unless an employer proves that the circumstances present additional burdens such as a need for speed, secrecy or flexibility. However, in the particular case he found that the company's reasons for relocating were not amenable to resolution through bargaining.

The reason for the balancing test in *First National Maintenance*, emphasised also in *Otis Elevator*¹⁵³, was to insulate managerial freedom from uncertainty "to the extent essential for the running of a profitable business."¹⁵⁴ In formulating its balancing test, the Court lost sight of the fact that many established mandatory subjects of bargaining are as important for running a profitable business as a partial

¹⁴⁹*Id.* at 893-4.

¹⁵⁰*Id.* at 897.

¹⁵¹NLRB Member Dennis admitted as much in a discussion of the case. Patricia Diaz Dennis, "Principles That Guide My Decision-making," 15 *Stetson L. Rev.* 13, 17 (1985).

¹⁵²269 NLRB 891, 900-901 (1984).

¹⁵³*Id.* at 892, citing *First National Maintenance*, 452 U.S. at 678-79.

¹⁵⁴452 U.S. 666, 678-9 (1981).

closure decision. There is some intrusion in management rights whenever an employer fulfills the statutory obligation to bargain collectively. Despite the inevitable risk to profitability of individual employers, however, the NLRA grants rights to employees and suggests that these rights are necessary to the free flow of commerce.¹⁵⁵

Given the purpose of the NLRA, another solution was possible. The dissent in the Supreme Court argued for a presumption of a duty to bargain based on the underlying policy of the Act.¹⁵⁶ Justice Brennan, joined by Justice Marshall, found the Court's balancing test unacceptable since it failed "to consider legitimate employment interests of the workers and their union."¹⁵⁷ They pointed out the application of the test was based solely on speculation, disregarding benefits that would in all likelihood accompany bargaining in a partial closure situation.¹⁵⁸

Recognition of a presumption of a duty to bargain not only serves the purpose of the Act to establish democratic self-government in industry through collective bargaining, but also serves the interest of pluralist industrial relations. To understand how this is possible, a different content has to be given to the pluralist doctrine, so as to avoid the paradox between the recognition of conflicting interests and the process of reducing union interests to the lowest possible level.

An attempt to restructure the concept of industrial pluralism may benefit from expositions of political theories of pluralism. American pluralism was described by Dahrendorf as "pluralism of institutions, conflict patterns, groupings and interests [which] makes for a lively, colourful and creative scene of political conflict which provides an opportunity for success for every interest that is voiced".¹⁵⁹ Pluralism valued the intervention of intermediate groups between the state and the individual, wanted to ensure that all groups were able "to have a foot in the political door" and

¹⁵⁵Sec. 1 of the Act states: "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption...". 29 U.S.C. sec. 151 (1982).

¹⁵⁶452 U.S. 666, 691 (1981). Zimmerman's concurrence in *Otis Elevator* attempts to work with the presumption idea within the framework of the *First National Maintenance* test by proposing that where amenability is found, then the subject is presumed to be mandatory unless the employer proves the need for speed, flexibility or secrecy. The speculative element is eliminated as the employer must prove the existence of the burden.

¹⁵⁷*Id.* at 689.

¹⁵⁸*Id.* at 690.

¹⁵⁹R. Dahrendorf, *Class and Class Conflict in Industrial Society* 317 (Stanford, California 1959).

introduced the concept of "countervailing power."¹⁶⁰ Galbraith observed that "the operation of countervailing power is to be seen with the greatest clarity in the labour market where it is also most fully developed" and claimed that "private economic power is held in check by the countervailing power of those who are subject to it".¹⁶¹

Following a suggestion by Hyman, it is submitted that the purpose of the Act and the interests of pluralist industrial relations would have been better served if the Court had admitted that "the priorities of capitalist industry [to which management is formally committed] are themselves only one [however dominant in practice] among a variety of sectional pressures."¹⁶² Allowing labour an input in corporate governance does not conflict with new theories which see the corporation as a bundle of contractual arrangements among a variety of parties - customers, suppliers, lenders, investors, managers and workers.¹⁶³ Under these theories every group contends on an equal basis with other groups using its particular input and bargaining strength.

Such an approach need not destroy profitability or injure commercial growth. Some Western European countries, despite imposing legislative constraints on managerial decision-making and allowing labour participation in making decisions, have increased productivity and sustained economic growth.¹⁶⁴ Productivity may be enhanced through improved performance by workers who believe that management considers their interests. A good argument can be made that employee participation can be of mutual benefit to employer and employee, and may be necessary to restore American competitiveness and increase social wealth.¹⁶⁵

¹⁶⁰D. Nicholls, *Three Varieties of Pluralism* 25 (London 1974).

¹⁶¹J.K. Galbraith, *American Capitalism* 125, 128 (Boston 1963).

¹⁶²R. Hyman, "Pluralism, Procedural Consensus and Collective Bargaining," 16 *British J. of Indus. Rel.* 25 (1978).

¹⁶³Michael C. Jensen and William H. Meckling, "The Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure," 3 *J. Fin. Econ.* 305, 311 (1976).

¹⁶⁴This does not suggest that decision-bargaining alone may account for a healthy economy. Many factors contribute to economic growth in a society. However, productivity increases in Western Europe belies the idea that negotiation with regard to major decisions would cripple the economy. See Clyde W. Summers, "Worker Participation in the U.S. and West Germany: A Comparative Study From an American Perspective," 28 *Am. J. Comp. L.* 367 (1980).

¹⁶⁵See Robert A. Dahl, *A Preface to Economic Democracy* 107-110 (Berkeley 1985) regarding the beneficial effect of "self-governing enterprises".

Disclosure

After *First National Maintenance* some of the most crucial decisions of an employer have been excluded from mandatory bargaining. There is no duty to bargain where "the burden placed on the conduct of the business" outweighs "the benefits for labour-management relations and the collective bargaining process"¹⁶⁶, or where decisions involve the "scope and direction of the enterprise"¹⁶⁷ or concern "the core of entrepreneurial control."¹⁶⁸ The Board in *Otis Elevator* suggested that a duty to bargain may exist where the decision turns primarily on labour costs. In this instance the employer will have to provide sufficient advance notice to give the union a meaningful opportunity to bargain about the decision. A union may be able to request information, even where the employer claims no duty to bargain over the decision, where it is possible to justify the request on the basis that the information will assist in determining the extent to which labour costs were a factor in making the decision.¹⁶⁹ A union may also justify a request for information by claiming that it will assist in effects-bargaining.

Effects-Bargaining

In *First National Maintenance* the Court made it clear that a union must be given a "significant opportunity" to bargain about matters of job security as part of effects-bargaining. The Court went to great length to stress the advantages of effects-bargaining while denying that greater benefits would result from decision-bargaining. The Court mentioned that a union, by pursuing its rights to bargain over the effects, "may achieve valuable concessions from an employer..." and stated that a union "has some control over the effects of [a] decision and indirectly may ensure that the decision is deliberately considered."¹⁷⁰

The problem with effects-bargaining, which has been noted above, is that it treats the employer's decision as a *fait accompli*. The union suffers a substantial

¹⁶⁶*First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678-79 (1981).

¹⁶⁷*Id.* at 676-77.

¹⁶⁸*Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 223 (1964)(Stewart, J., concurring).

¹⁶⁹*Workplace Closures and Company Reorganizations: Enforcing NLRB, Contract and Non-Contract Claims and Obligations*, Paper presented at the Twenty-Second Teamsters Lawyers Conference, New Orleans, Louisiana (1989).

¹⁷⁰452 U.S. 666, 682 (1981).

disadvantage in bargaining power and will in most cases only be able to gain short term benefits from bargaining. Although the Court has stated that bargaining over the effects of a decision must be conducted "in a meaningful manner and at a meaningful time"¹⁷¹ the Courts often do not allow adequate preparation time for the union.¹⁷² An additional problem is that an employer may have few incentives not to implement a decision before it begins bargaining and the Board is unlikely to protect effects-bargaining by ordering an employer to undo a decision that it has the legal right to effect unilaterally.¹⁷³ If the decision resulted in the termination of jobs for employees, an effects-bargaining order from the Board may at most help the union to request special severance pay, transfer rights to other plants, or job relocation assistance.¹⁷⁴

Proactive conduct by the union

In interpreting the NLRA, the American Courts have taken a clear stand in favour of management interest. Workers' interests in bargaining over entrepreneurial decisions have been scaled down to leave the seller almost completely free to make whatever deal is desired. The only real protection for employees in a business transfer situation under the present state of the law derives from the collective bargaining agreement. One possible concern of a seller may be a successors and assigns clause in the collective agreement. Although it has been held that such a clause does not bind the purchaser,¹⁷⁵ the union has several options to pursue against the predecessor. The predecessor may incur liability for failure to persuade the successor to

¹⁷¹*Id.* at 681.

¹⁷²In one case a five day notice of closure was not regarded as sufficient. See *NLRB v. Emsing's Supermarket*, 872 F.2d 1279 (7th Cir. 1989). However, the Board has found a week's notice sufficient in case of business necessity. See *Creasy Co.*, 268 NLRB 1425 (1984). The notice requirement may be affected by the provisions of The Worker Adjustment and Retraining Notification Act (WARN Act), which was enacted in August 1988, 29 U.S.C. sec. 2101 *et seq.* (1988)). The WARN Act requires 60 days written notice before plant closings or mass layoffs "so that workers and their communities may try to make some arrangements in connection with their own lives and their future employment and training"(134 Cong. Rec. S 8375 (daily ed. June 22, 1988)(statement of Sen. Metzenbaum)). Three conditions allow for a reduction of the 60-day period, namely a "faltering company", "unforeseeable business circumstances" and "natural disaster" (WARN Act sec. 3(b), 29 U.S.C. sec. 2102)).

¹⁷³Michael C. Harper, "Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining," 68 Va. L. Rev. 1447, 1482 (1982).

¹⁷⁴*Id.* at 1483. The Board is unlikely to protect effects-bargaining by ordering an employer temporarily to undo a decision that it has the legal right to effect unilaterally.

¹⁷⁵*Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 294-95 (1974).

accept the union contract.¹⁷⁶ Moreover, a clause in a union contract which binds successors and assigns may enable a union to enjoin the sale if it has not been made contingent on the successor assuming the contract. Failing that, the predecessor may be liable for a breach of the labour contract if it remains a viable entity.¹⁷⁷

Collective contracts have not proved to be sufficient insulation against the legal trend which allows private power to nullify the democratic aspirations of the statute.¹⁷⁸ Case law permits employers to transfer bargaining unit work so as to evade collectively bargained terms and conditions of employment. In *Milwaukee Spring II*¹⁷⁹ the Board found a unilateral midterm transfer of bargaining unit work to a non-union facility so as to avoid collectively bargained wage rates lawful.

Milwaukee Spring, after bargaining with the union and failing to secure its consent, unilaterally implemented its proposals to transfer operations.¹⁸⁰ This resulted in the layoff of employees. The Board initially held that the transfer constituted an unlawful midterm modification of a collective bargaining agreement's recognition clause.¹⁸¹ The holding was subsequently reconsidered and reversed and the Board found that the recognition clause in the collective bargaining agreement did not constitute a work preservation clause which precluded the transfer of work during the duration of the agreement. It indicated that labour organisations wishing to prevent midterm production transfers had to obtain express work-preservation clauses precluding such actions by the company.¹⁸² This holding implies that since the mandatory subject was not contained in the agreement,¹⁸³ the employer, after bargaining to impasse, could unilaterally implement its decision. On the other hand,

¹⁷⁶*Id.* at 257-58 n.3.

¹⁷⁷*Id.* at 257.

¹⁷⁸Karl E. Klare, "Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin," 44 Maryland L. Rev. 731, 768-69 (1985).

¹⁷⁹*Milwaukee Spring II*, 268 NLRB 601 (1984), *enforced sub nom. International Union, UAW v. NLRB*, 765 F.2d 175 (D.C.Cir. 1985).

¹⁸⁰The union conceded that the employer fulfilled its bargaining obligation under sec. 8(a)(5).

¹⁸¹*Illinois Coil Spring Company (Milwaukee Spring I)*, 265 NLRB 206 (1982), *rev'd*, 268 NLRB 601 (1984). Sec. 8(d) prohibits the midterm modification of a collective bargaining agreement without the union's consent.

¹⁸²268 NLRB 601-05.

¹⁸³The collective bargaining agreement did not contain a zipper clause waiving bargaining.

if a subject is contained in an agreement, changes can only be made if the union consents. By taking a very narrow approach to what is "contained" in a collective bargaining agreement, the decision in *Milwaukee Spring* works to the benefit of employers, allowing them to change the situation of employees covered by a collective bargaining agreement for their own economic benefit.

One method to combat workplace transformations is through the filing of grievances alleging violations of specific contract clauses. As *Milwaukee Springs* cautions, however, such contract clauses need to be specific. Such grievances may provide the basis for obtaining an injunction pending arbitration to prohibit an employer from effecting a closure or sale.¹⁸⁴ However, the success of labour's efforts to enjoin unilateral investment decisions pending arbitration has been described as "quixotic" since victory merely postpones the employer's plans.¹⁸⁵ The outcome ultimately depends on specific language in the collective bargaining agreement and it may be a problem for the union to negotiate contract language restricting management's control over investments. The majority of investment decisions are considered permissive subjects of bargaining which means that a union has no right to insist to impasse on language restricting the employer's power to implement such decisions.

Obligations of the transferee

Introduction

The doctrine of employer successorship in the United States represents an attempt to balance the interests of the parties in business transfer situations while ensuring the uninhibited transfer of capital and an unimpeded flow of commerce within society. Underlying this doctrine is the idea that obligations can be imposed on an employer who perpetuates an existing enterprise and reaps benefits from the continuation of the business.¹⁸⁶ Factors which are considered relevant to determine

¹⁸⁴*IBT Local 115 v. De Soto, Inc.*, 725 F.2d 931 (3d Cir. 1984). See also *Workplace Closures and Company Reorganizations: Enforcing NLRB, Contract and Non-Contract Claims and Obligations* 5, Paper presented at the Twenty-Second Teamsters Lawyers Conference, New Orleans, Louisiana (1989).

¹⁸⁵Staughton Lynd, "Investment Decisions and the Quid Pro Quo Myth," 29 Case W. Res. L. Rev. 396, 410 (1979).

¹⁸⁶ The imposition of obligations on the transferee assumes that the new employer is not "merely a disguised continuance of the old employer" (*Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942)). Such cases, usually referred to as alter ego cases, concern organisational changes undertaken not for
(continued...)

the continuity of the enterprise and the status of the transferee include production of similar goods or services as before; use of the same plant and machinery; employment of the same work force; existence of the same jobs; continuance of the work without interruption; maintenance of the same organisational structure in an enterprise of the same size.¹⁸⁷ The most important factor in recent cases has been the extent to which a transferee hires the work force of the transferor.

*John Wiley & Sons v. Livingston*¹⁸⁸

The obligations of a transferee upon a change in corporate ownership, was first addressed by the United States Supreme Court in *John Wiley & Sons v. Livingston*. The Court recognised the need for protection to contractually based interests of employees and sought to accommodate this need in accordance with national labour policy. The Court stated that "the objectives of national labour policy, reflected in established principles of federal law, require that the rightful prerogatives of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship."¹⁸⁹ Protection of employees and preservation of some of their rights were considered important, given the fact that employees do not usually participate in capital decisions.¹⁹⁰

The *Wiley* case concerned a merger between Interscience, a small publishing firm whose employees were covered by a collective bargaining agreement, with the larger and non-unionised publishing company of John Wiley & Sons, Inc.. When the employees of Interscience were integrated with the Wiley employees, the question arose whether the collective bargaining agreement with Interscience remained in force. The union brought an action under section 301 of the Labour Management Relations

¹⁸⁶(...continued)

legitimate business purposes, but frequently to avoid the effect of labour laws or to evade obligations under labour contracts. In these circumstances the Court will be predisposed to pierce the corporate veil and to hold that the transferee is in reality the same employer and subject to all the legal and contractual obligations of the transferor.

¹⁸⁷See Stephen B. Goldberg, "The Labor Law Obligations of a Successor Employer," 63 Nw. U.L. Rev. 735, 746-72, 793-806 (1969).

¹⁸⁸*John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964).

¹⁸⁹*Id.* at 549.

¹⁹⁰*Id.* at 549.

Act (Taft-Hartley Act)¹⁹¹ to compel Wiley to arbitrate the extent to which certain contract rights had survived the merger. The Supreme Court held that:

"the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement and that, in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement."¹⁹²

Two pillars supported the Court's conclusion: the nature of the collective bargaining agreement and the circumstances surrounding the transaction. The Court stated that the collective bargaining agreement "calls into being a new common law - the common law of a particular industry or of a particular plant."¹⁹³ Since the agreement was "not in any real sense the simple product of a consensual relationship"¹⁹⁴ the Court was of the opinion that the policy considerations favouring arbitration should prevail to impose some liability on a non-consenting transferee. The circumstances were such that substantial "continuity of identity" existed between the old and the new employers,¹⁹⁵ a critical factor to determine liability for the purposes of arbitration on the terms of a collective bargaining agreement. The Court suggested that "continuity of identity" could be found in different transfer situations, not only where an employer disappeared as a result of a merger, but also in those cases where one employer replaced another while the business entity remained the same.¹⁹⁶

Wiley was generally interpreted to mean that a transferee was bound in some ways to the transferor's collective bargaining agreement and that it was for an arbitrator to determine which terms of the previous contract should apply to the transferee, considering relevant new circumstances arising out of the change of

¹⁹¹Sec. 301 provides for federal jurisdiction over suits "for violation of contracts between an employer and a labour organisation."

¹⁹²376 U.S. 543, 551.

¹⁹³*Id.* at 550. This statement reiterates a point made in *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960) that the collective bargaining agreement was not an ordinary contract but a "generalised code" to govern the whole employment relationship (at 578-79), "an effort to erect a system of industrial self government" (at 580).

¹⁹⁴376 U.S. 543, 550 (1964).

¹⁹⁵*Id.* at 551.

¹⁹⁶*Id.* at 549.

ownership.¹⁹⁷ On policy grounds *Wiley* could be defended in terms of "the impressive policy considerations favouring arbitration."¹⁹⁸ The case furthered the national labour policy of avoiding industrial strife, in instances where significant aspects of the employment relationship remained unchanged, by striking a proper balance between narrow contractualism,¹⁹⁹ which would impose no obligations on an unconsenting transferee, and limited employer liability to arbitrate grievances under the transferor's labour contract.²⁰⁰ This balance has been distorted in subsequent cases involving transfer situations. The employer's liability has been demarcated and confined, while the concern for employees expressed in *Wiley* has disappeared from the logic.

NLRB v. Burns International Security Services, Inc.

The next important case to deal with the rights and obligations of a transferee employer, arose not in the context of a section 301 suit to compel arbitration, but in the context of an unfair labour practice proceeding.²⁰¹ In *NLRB v. Burns International Security Services, Inc.*,²⁰² Burns replaced Wackenhut as plant protection service for Lockheed Corporation. Burns employed a workforce which consisted of a majority of former Wackenhut employees but refused to bargain with the union that had represented these employees or to honour the transferor's collective bargaining agreement. The Supreme Court ruled that although the transferee was under no obligation to adopt the collective bargaining agreement, it had an obligation to bargain with the union. The obligation to bargain was limited to circumstances in which the

¹⁹⁷See *United Steelworkers v. Reliance Universal, Inc.*, 335 F.2d 891 (3d Cir. 1964); *Printing Pressmen, No. 447 v. Pride Papers-Aaronson Bros. Paper Corp.*, 75 L.R.R.M. 2185, *aff'd*, 445 F.2d 361 (2d Cir. 1971); *Retail Store Employees Local 954 v. Lane's of Findlay, Inc.*, 260 F. Supp. 655 (N.D. Ohio 1966); *McGuire v. Humble Oil & Ref. Co.*, 247 F. Supp. 113 (S.D.N.Y. 1965), *rev'd on other grounds*, 355 F.2d 352 (2d Cir.), *cert. denied*, 384 U.S. 988 (1966).

¹⁹⁸376 U.S. 543, 550 (1964). See also *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior Gulf*, 363 U.S. 574 (1960).

¹⁹⁹A narrow interpretation of the common law viewed a collective bargaining agreement as creating personal rights and obligations between consenting parties and regarded Congressional action to be necessary before a transferee could be bound by the arbitration clause of a transferor's labour contract. See D. Benetar, "Successorship Liability Under Labour Agreements," 4 Wisc. L.Rev. 1026, 1029 (1973).

²⁰⁰See S. Goldberg, "The Labor Law Obligations of a Successor Employer," 63 Northwestern U.L. Rev. 735, 738 and 740-745 (1969); James B. Atleson *Values and Assumptions in American Labor Law* 161 (Amherst, Massachusetts 1983).

²⁰¹Sec. 8(a)(1) and (5) of NLRA, 29 U.S.C., sec. 158(a)(1) and (5) (1970).

²⁰²*NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

new bargaining unit consisted of a majority of former employees of the transferor.

The Court's ruling reflected the preference for private bargaining, rather than judicial or government compulsion, to establish the terms of a labour agreement.²⁰³ A distinction was drawn between the imposition of a contract in the context of the duty to bargain under section 8(a)(5) of the NLRA and the continuity of contractual provisions in the context of a section 301 suit to compel arbitration. The Court sought to explain the difference in terms of the strong federal labour policies supporting the latter process as a means to achieve a peaceful settlement of labour disputes. However, no satisfactory answer was given to the question why at least the arbitration provision of an agreement survives a transfer in an action under section 301, while an employer is not bound at all by the existing contract under the provisions of the NLRA.²⁰⁴ The apparent inconsistency between different outcomes resulting from different statutory contexts implies that the union in *Burns* would have had a much greater chance of success if it had followed *Wiley* and sought the avenue of arbitration under the collective bargaining agreement.²⁰⁵

If the Court's reasoning fails to give an adequate explanation for the apparent contradiction, it is important for revealing the train of legal thought. The main concern was not to "discourage and inhibit the transfer of capital", a result which the Court thought was likely to occur if an employer was saddled with the terms and conditions of employment contained in a pre-existing collective bargaining agreement.²⁰⁶ The overriding concern for capital mobility and an employer's flexibility to "make changes in corporate structure, composition of the labour force, work location, task assignment and nature of supervision"²⁰⁷ was unsupported by the facts since *Burns* had instituted no changes of the nature mentioned by the Court. Despite the lack of a factual basis, the fear of capital inhibition dominated to the extent that any important rights which employees may have under the collective bargaining agreement were

²⁰³*Id.* at 287.

²⁰⁴Charles J. Morris and William Gaus, "Successorship and the Collective Bargaining Agreement: Accommodating *Wiley* and *Burns*," 59 *Vir. L. Rev.* 1359, 1370 (1973).

²⁰⁵James B. Atleson, *Values and Assumptions in American Labor Law* 165 (Amherst, Massachusetts 1983); Frederick K. Slicker, "A Reconsideration of the Doctrine of Employer Successorship - A Step Toward a Rational Approach," 57 *Minn. L. Rev.* 1051, 1098-99 (1973).

²⁰⁶406 U.S. 272, 287-88 (1972).

²⁰⁷*Id.* at 287-88.

ignored. These rights include a measure of job security, accumulation of job benefits and a system of dispute resolution. The Court did not seek to establish any middle ground between complete freedom of capital mobility and the interests of employees.²⁰⁸

In the *Burns* case no consideration was given to the fact that protection of employee interests in the United States depends to a large extent on the collective bargaining agreement.²⁰⁹ Legislation does not provide protection against arbitrary dismissal and any such protection will only be attained through collective bargaining. Moreover, the collective bargaining agreement protects a number of accumulated rights and benefits which are not limited to the life of a single contract.²¹⁰ The destruction of all accrued rights of employees can have a devastating effect and an obligation to bargain will not be likely to ameliorate the situation. The union's ability to retain benefits through collective bargaining is uncertain, especially since *Burns* stated that a transferee is "ordinarily free to set initial terms on which it will hire the employees of a predecessor."²¹¹ The Court argued that a transferee could not be guilty of changing the terms or conditions of employment unilaterally because as a new employer "it had no previous relationship whatsoever to the bargaining unit and ... no outstanding terms and conditions of employment from which a change could be inferred."²¹² This leaves a transferee more freedom than other employers who are normally restrained from making changes in working conditions without first bargaining to impasse with a union.

The Court was overly aware of "problems" for an employer who acquires a business with a pre-existing labour agreement and ignored the benefits of the agreement for the protection of employees. Moreover, it disregarded the role of the contract in the public interest: a mechanism for the resolution of potential labour

²⁰⁸Morris and Gaus argue convincingly for the use of arbitration to enforce labour contracts in successorship cases. The method of arbitration would be flexible and adequate to adjust the old contract to the new employer and would not unduly discourage and inhibit the transfer of capital. Charles J. Morris and William Gaus, "Successorship and the Collective Bargaining Agreement: Accommodating Wiley and Burns," 59 Vir. L. Rev. 1359, 1384 (1973).

²⁰⁹See, e.g., E. Kassalow, *Trade Unions and Industrial Relations: An International Comparison* 132 (New York 1969).

²¹⁰Charles J. Morris and William Gaus, "Successorship and the Collective Bargaining Agreement: Accommodating Wiley and Burns," 59 Vir. L. Rev. 1359, 1382 (1973).

²¹¹406 U.S. 272, 294 (1972).

²¹²*Id.* at 294.

disputes.²¹³ The Court appeared to accept that industrial peace could not be achieved in every case, and, rather than unduly restraining employers' rights and actions, to allow the parties to fight it out anew.²¹⁴ Freedom for the employer was regarded as the ultimate goal, more worthy of protection than the public interest in peaceful industrial relations and economic stability, more compelling than the employees' perception of a legitimate interest in continued employment²¹⁵ and more fundamental than the commitment to collective bargaining.

***Howard Johnson Co. v. Detroit Local Joint Executive Board*²¹⁶**

In *Howard Johnson Co. v. Detroit Local Joint Executive Board*, freedom for the employer was again the dominant theme, this time in the context of a transferee's duty to arbitrate the extent to which it was bound to the transferor's collective bargaining agreement under section 301. A franchisee sold all the assets of a restaurant and motor lodge to the franchiser, Howard Johnson, and agreed to lease to the company the property on which the business was located. Howard Johnson commenced operations with a work force of forty-five employees, only nine of whom had previously been employed by the transferor. The union brought suit under section 301 of the Labour Management Relations Act²¹⁷ seeking an order to compel arbitration to determine the extent of the transferee's obligations under the transferor's contract.

Although decided within the same context as *Wiley*, *Howard Johnson* differed significantly: the hedges around the duty to arbitrate were drawn closer, leaving the employer with a wide discretion. The Court held that the duty to arbitrate would only be imposed in instances where there was a "continuity in identity" in the business enterprise, which included a "substantial continuity in the identity of the work force."²¹⁸ Should the employer decide to hire a new work force which includes only a minority of the transferor's employees, no obligation to arbitrate arises. The only

²¹³See Charles J. Morris and William Gaus, "Successorship and the Collective Bargaining Agreement: Accommodating Wiley and Burns," 59 Vir. L. Rev. 1359, 1386 (1973).

²¹⁴406 U.S. 272, 288 (1972).

²¹⁵See, e.g., *NLRB v. Armato*, 199 F.2d 800, 803 (7th Cir. 1952); *Cruse Motors, Inc.*, 105 NLRB 242, 247 (1953).

²¹⁶*Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974).

²¹⁷29 U.S.C., sec. 185.

²¹⁸417 U.S. 249, 257-65 (1974).

constraints on the employer's discretion are the prohibitions against discrimination.²¹⁹

When the transferee has an almost unlimited discretion to eliminate employees' jobs, little remains of the concern expressed in *Wiley* for the protection of employees confronted with a change in the enterprise. Although *Wiley* was not overruled expressly, the future vitality of *Wiley* is likely to be threatened by *Howard Johnson's* emphasis on the right of a purchaser to make appropriate changes in a business, including the hiring of his own independent work force.²²⁰ This right follows from the Court's statement that the basic policies that control in an unfair labour practice context cannot be disregarded in a section 301 suit.²²¹ The Court observed that "[c]learly the reasoning of *Burns* must be taken into account here."²²² It is difficult to defend why an employer who takes over a business and makes no basic changes in operation that require changes in the work force should be allowed the freedom to discharge any number of employees, while enjoying all the benefits of continuity.²²³

Regrettably for the union, the Court found that a "successor's and assigns" provision contained in the transferor's labour contract had no impact on the transferee's operations. In *Howard Johnson* the labour contracts which the seller of the business had with the union stipulated that they were binding on "successors, assigns, purchasers, lessees or transferees of the Employer ... provided the establishment remains in the same line of business."²²⁴ When the transferee refused to accept the labour contracts, the transferor terminated the employment relationship with effect from the date of the transfer of the business. In the absence of substantial continuity and any express or implied assumption by the purchaser of obligations under the collective bargaining agreement, the mere existence of a successors and assigns clause was found to be insufficient to bind the transferee to the agreement. The Court remarked that the union had failed to consider legal action to enjoin the sale

²¹⁹Sec. 8(a)(1) and (3).

²²⁰Sue J. Henry, "Is There Arbitration After *Burns*?: The Resurrection of John Wiley & Sons," 31 *Vanderbilt L. Rev.* 249, 265 (1978).

²²¹417 U.S. 249, 256 (1974).

²²²*Id.* at 256.

²²³Charles J. Morris and William Gaus, "Successorship and the Collective Bargaining Agreement: Accommodating *Wiley* and *Burns*," 59 *Vir. L. Rev.* 1359, 1395 (1973).

²²⁴417 U.S. 249, 266 n.1 (1974).

as a breach of the successorship clause in the contract. However, since the transferor in this case continued to be a viable entity with substantial assets the union had an effective means to satisfy contractual claims, by seeking damages against the transferor for breach of the agreement.

Conclusion

The law as interpreted and applied in the United States in business transfer situations serves the predominant goal of free capital mobility which entails freedom to set the initial terms and conditions upon transfer and freedom to hire a new work force.²²⁵ The employer's freedom is not counterbalanced by a concern for the protection of representational or contractual rights of employees or for the avoidance of industrial unrest. It is not taken into account that imposition of the transferor's labour contract will not necessarily impede the transfer of capital and, "by providing transitions with a minimum of disruption, may advance the cause of industrial peace."²²⁶ The transferee may reap the benefits of absence of economic unrest as well as predictability of labour costs.²²⁷ Should the costs be too high, especially in the case of a failing company, a transferee will be able to negotiate a new labour contract with the union as a precondition for the take over of the business. Unions, concerned about their own interests as well as those of the business, will need little convincing to agree to the transferee's contract proposals rather than lose their jobs and go under with a moribund business.²²⁸

In limited circumstances a transferee may be required to arbitrate grievances

²²⁵James Severson and Michael Willcoxon, "Successorship Under Howard Johnson: Short Order Justice For Employees," 64 Calif. L. Rev. 795, 844 (1976) made the observation that the practical effect of the successor doctrine is destroyed by allowing the transferee unilaterally to determine its labour obligations simply by monitoring the size of the employee contingent inherited from the transferor.

²²⁶*International Ass'n of Machinists Dist. Lodge 94 v. NLRB*, 414 F.2d 1135, 1139 (D.C. Cir. 1969)(Leventhal, J., concurring). See also James Severson and Michael Willcoxon, "Successorship Under Howard Johnson: Short Order Justice For Employees," 64 Calif. L. Rev. 795, 827 n. 153 (1976) where they point out that the exact magnitude of the restriction of capital flow and the attendant debilitating effect on the market are highly conjectural and may in fact be minimal. Data on merger and acquisition are at best inconclusive on the question of what effect requiring successors to honour extant collective agreements has had on the free flow of capital.

²²⁷Sue J. Henry, "Is There Arbitration After Burns?: The Resurrection of John Wiley & Sons," 31 Vanderbilt L. Rev. 249, 295 (1978).

²²⁸*Id.* at 296.

under a transferor's labour contract²²⁹ and to remedy a transferor's unfair labour practices²³⁰. Confined as these orders are, they represent a reasonable accommodation of competing interests. An order requiring arbitration will avoid industrial strife by protecting employees' expectations from the effects of sudden business changes over which they have no control.²³¹ Arbitration has the advantage of promoting "industrial harmony through a fair, fast and flexible system utilizing neutral but knowledgeable 'peace-makers.'"²³² The arbitrator's expertise and the speed of arbitration are likely to contribute to a fair and practical resolution of union grievances against the transferee. Since employee participation in crucial decisions to sell or merge is not encouraged or protected by law, employees have no other means to represent their interests than through imposing provisions of the transferor's labour contract, such as an arbitrator may deem reasonable and equitable in view of the change in employer, on the transferee.²³³ The transferee is usually the only one who can provide an effective remedy for employees for claims involving not only monetary damages but, for example, continued employment, discharge without just cause, and violation of seniority rights.²³⁴

The principle that the transferee is responsible to remedy a transferor's unfair labour practices, was expressed in *Golden State Bottling Co. v. NLRB*.²³⁵ In this case, a transferee had purchased a business and hired employees with knowledge that the transferor had committed an unfair labour practice by discharging an employee for engaging in union activities. The Court held that the Board could order the reinstatement of the employee with back pay and indirectly gave support to the policies expressed in *Wiley* of avoiding labour strife and protecting the exercise of

²²⁹*John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964).

²³⁰*NLRB v. Golden State Bottling Co.*, 414 U.S. 168 (1973).

²³¹See, e.g., Note, "Contractual Successorship: The Impact of Burns," 40 U. Chi. L. Rev. 617, 621-22 (1973); Sue J. Henry, "Is There Arbitration After Burns?: The Resurrection of John Wiley & Sons," 31 Vanderbilt L. Rev. 249, 268 (1978).

²³²*International Ass'n of Machinists v. Howmet Corp.*, 466 F.2d 1249, 1253 (9th Cir. 1972).

²³³See Note, "Labor Law - Effect on Successor Employer of Predecessor's Collective Bargaining Agreement," 86 Harv. L. Rev. 247, 256 (1972).

²³⁴Stephen B. Goldberg, "The Labor Law Obligations of a Successor Employer," 63 Nw. U.L. Rev. 735, 755 (1969); Sue J. Henry, "Is There Arbitration After Burns?: The Resurrection of John Wiley & Sons," 31 Vanderbilt L. Rev. 249, 270 (1978).

²³⁵414 U.S. 168 (1973).

guaranteed employee rights. By requiring a transferee to remedy the unfair labour practices of the transferor it is possible to strike a more equitable balance between the interests of the victimised employee, the transferee and the public.²³⁶

²³⁶*Id.* at 181-85.

CHAPTER 3

THE PROTECTION OF WORKERS IN THE CASE OF BUSINESS TRANSFERS: UNITED KINGDOM

Introduction

Structural business changes which occur as a result of a transfer commonly involve managerial decisions which impinge on the rights of employees. Such decisions do not only concern the change of employer, but are often accompanied by decisions concerning redundancy, reorganisation or insolvency. In the United Kingdom, laws intervene in situations such as these to regulate to some extent the procedural aspects of decision-making and the substantive impact upon workers' rights. These laws, their introduction, sometimes as a result of European Community obligations, and their development through judicial interpretation will be discussed in this chapter. The discussion will first turn to the Transfers Directive, its objectives, scope, and specific transfer provisions, and to the way that it has been implemented in the United Kingdom. After that a discussion of the redundancy and insolvency provisions will follow, and the last section will consider the part played by trade unions in the different schemes. Since the legal rules can only be appreciated against the background of the basic common law which previously regulated the consequences of a change of employer, a brief outline of the common law will be given in the section following immediately.

The common law position

Pervading the law of employment has always been the notion that contract is based upon agreement. In terms of the common law of the contract of employment, contracts can be transferred only by novation, which requires the consent of both parties to the contract as well as the substituting party. The non-assignability of employment contracts has generally been defended on the basis of their personal nature, perhaps most powerfully so by Lord Atkin in *Nokes v. Doncaster Amalgamated Collieries Ltd.* with the famous statement: "I had fancied that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve, and that this right of choice constituted the main difference between a servant

and a serf."¹

The common law's assertion that an employee should be regarded as a servant, not a serf, implies a freedom of choice for the individual employee when confronted with a transfer situation that occurs without any knowledge on the part of the employee. In most instances, however, this choice serves no protective function since the common law makes no provision for automatic transfer of employees' acquired rights in the event of their choosing to move with the business and accept an offer of employment from the transferee.² In reality, a break in continuity caused by a transfer usually works to the employee's disadvantage. The transferee's options are completely open: to engage an employee on any set of terms and conditions, or not to engage any employees of the transferor at all. Any outstanding claims of an employee who suffers a loss of employment as a result of a transfer, have to be made against the transferor, particularly a claim for wrongful dismissal in instances which point to a repudiatory breach of the contract. Since the mere fact of a transfer does not terminate the employment contract, a termination is lawful if the contract is complied with and due notice is given by the transferor.³ This means that a worker's common law rights usually extend to no more than a period of notice which may be merely a few weeks.

The limitations of the common law's standard assumption -- freedom of contract equals freedom of choice -- are evident in most transfer situations and two important flaws of this equation have been identified.⁴ First, underlying the assumption is a premise of mutuality: the employee's freedom to choose not to work for an employer is matched by the transferee's freedom not to offer employment to an

¹[1940] App. Cas. 1014, 1026 (H.L.).

²Note also that the common law never gave an employee the right to object to a transfer taking place. This was recently pointed out in a decision of the Court of Appeal which involved an unsuccessful attempt by an employee to restrain a business reorganisation. *Newns v. British Airways plc*, [1992] I.R.L.R. 575 (C.A.).

³There is some controversy regarding the effect of a transfer on a contract. In *Secretary of State for Employment v. Spence*, [1986] I.R.L.R. 248, 250 (C.A.), Balcombe L.J. states that the transfer actually determines the contract. Other writers think that the transfer only amounts to a unilateral repudiation of the contract, which gives the innocent party the right to terminate. See, e.g., F. YOUNSON, *Employment Law and Business Transfers: A Practical Guide* 50 (London 1989); P.L. DAVIES and M. FREEDLAND, *Transfer of Employment* (London 1982).

⁴O. Kahn-Freund, "Contemporary note on the decision in *Nokes v. Doncaster Amalgamated Collieries Ltd.*, [1940] A.C. 1014 (H.L.)," 4 Mod. L. Rev. 221 (1941); P.L. DAVIES, "Acquired Rights, Creditors' Rights, Freedom of Contract, and Industrial Democracy," 9 Y.B. Eur. L. 21, 49-50 (1989).

employee. This premise rests upon the idea that the common law operates in a neutral fashion, unbiased as between the interests of employers and employees. For the bulk of employees affected by a business transfer, whose main concern is to preserve employment, not to absent themselves from work, this premise denies protection and has no relevance. Unlike the employee in *Nokes* who could successfully raise the liberal argument concerning freedom of contract to assert his right *not* to be employed by the transferee, most employees' interests lie in the assertion of a right to be employed. In all these cases there is no parity between the choices of the employees and the transferee which would justify an assertion of mutuality. What is more, these cases demonstrate that a belief in the neutrality of the principles of the common law is essentially naive. Its origins can be traced to the ideology of contract and property which has been dominant in the last two centuries and which, in the context of transfers as in many others, favours the employer.

A second problem with the common law belief in freedom of contract concerns the nature of the modern corporation. Without the employees' knowledge or consent, behind the obscuring corporate veil, control of the company may change. The law of contract does not attach significance to many such changes in the identity of the employer. Alternatively, without there being a change in the control of the company, the person who on a day to day basis acts as the employee's direct employer, for instance the manager of a company, may be replaced by another. Again the law of contract ignores these changes which may have a direct effect upon an employee and imply a significant transformation of the employing enterprise. In such instances the freedom of contract argument does not tally with the reality of the modern work environment. It is unrealistic to cling to the idea which Lord Atkin expressed in *Nokes* that an employee cannot be compelled to serve a new master, when "had the whole share capital of the transferor company been transferred instead of the undertaking, the man would have been compelled to serve what, in reality, was a new master."⁵ With regard to different kinds of commercial transfers, it is desirable to look for a labour law framework which takes into account the actualities of the relationship between employer and employee and does not depend upon the method chosen to transfer control, whether it takes place by way of a sale of the business, a takeover of shares or any other method.

The common law provisions for the protection of employees in the event of

⁵L.C.B. Gower, *Principles of Modern Company Law* 124 (5th ed. London 1992).

structural changes in the enterprise are so limited that they bear little relation to the expectations of employees working under the realities of the modern business world. Changing patterns of commerce and industry have made it necessary to supplement the law of the contract of employment with concepts "which enable the employment relationship to be seen as a valuable entity extending beyond the confines of the particular contract of employment with the particular employer."⁶ It is against this background that the introduction of statutory provisions for the expansion of workers' rights, mostly under the influence of the European Communities, should be viewed. These statutory provisions will be the subject of discussion in the rest of this chapter, specifically those that provide for the preservation of employees' rights in the event of transfers of undertakings, for the payment of financial compensation in circumstances which lead to a loss of jobs, and for some form of trade union participation in decisions which involve substantial changes in the enterprise.

The creation of a "European social area"⁷

Around the time when the United Kingdom became a member of the European Community on January 1, 1973, signs of recession and industrial unrest in EC member countries caused general concern that economic integration in itself would not be able to protect working and living standards.⁸ During this period an upsurge in strikes and wage explosions occurred throughout Europe. Contrary to the initial expectations, the perception dawned that economic benefits had not been experienced across the board and that certain groups were adversely affected by the processes of economic integration; workers specifically needed legal protection. Moreover, ideals of equity and redistribution and the need to give the Community a "human face" motivated a more active social policy.⁹ A declaration by Community Heads of Government in 1972 "that they attribute the same importance to energetic proceedings in the field of social policy as to the realisation of the economic and financial union"¹⁰ signified a

⁶M.R. Freedland, *The Contract of Employment* 371 (Oxford 1976).

⁷See B.A. Hepple, "The Crisis in EEC Labour Law," 16 *Indus. L.J.* 77, 85 (1987).

⁸*Id.* at 85.

⁹Chris Brewster and Paul Teague, *European Community Social Policy* 65 (London 1989).

¹⁰Conferences of the Heads of Government of the Member States were held in The Hague in December 1969 and in Paris in October 1972.

clear change from the earlier neo-liberal phase of EC social policy and led to social action programmes by the organs of the EC.¹¹ Among the specific measures resulting from the action programmes were Council Directive 75/129 on the harmonisation of provisions for collective redundancies, Council Directive 80/987 on the harmonisation of the provisions for the protection of workers in the event of insolvency of the employer, and Council Directive 77/187 on the harmonisation of the provisions for the protection of workers on the transfer of undertakings.

The Transfers Directive can be considered a novel development, notably so in Britain where it was reluctantly implemented after the European Commission threatened the Government with legal proceedings for failure to implement it, and more strikingly so after recent legislative amendments.¹² The development extends to two levels: first, the automatic transfer of contracts of employment and collective agreements, and second, participation arrangements, such as the duty to inform and consult the representatives of recognised trade unions when a transfer is contemplated. The Directive¹³ brought about a reversal of the rule in *Nokes* with the endorsement of the underlying principle of automatic novation of the contract of employment for all employees who are employed in an undertaking immediately before a transfer takes place. The automatic transfer of acquired rights is supported by two complementary provisions of the Directive. Not only do employees' transfer rights extend to the continuing observance by the transferee of the terms and conditions of the individual contract of employment and the collective agreement,¹⁴

¹¹The first programme was adopted by the Council on June 27, 1972, O.J. Eur. Comm. (No. C 23)(1972), and the second on January 21, 1974, O.J. Eur. Comm. (No. C 13)(1974).

¹²The Trade Union Reform and Employment Rights Bill (TURER) was introduced into Parliament in November 1992.

¹³Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of the transfers of undertakings, businesses or parts of businesses.

¹⁴Art. 3(1) and 3(2). Art. 3(1) provides for the transfer of the individual contract of employment and all rights and obligations arising from it, which in effect creates the same set of contractual terms and conditions between the employee and the transferee that existed previously in the employment relationship with the transferor. In a similar fashion, art. 3(2) provides for the transfer of collective rights and requires that "the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement."

but also to protection against dismissal which occurs as a result of the transfer itself.¹⁵ This protection is qualified, however, to allow for "dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce."

The Transfers Directive

1. Objective

When the Acquired Rights Directive was introduced by the European Commission it was as part of a social program which aimed at mitigating the effects of recession and legitimating the Community "as a political ideal based upon social justice."¹⁶ The Directive was introduced primarily to counter the adverse effects on employees of the economic processes in the Community. Its aim was to achieve justice by distributing the costs of economic and social changes so that employees did not have to carry the whole burden. This ambitious aim, based on a thoughtful interpretation of economic and social conditions, was expected to be workable and the drafters of the Directive did not perceive any basic incongruity with the economic and social environment in which the law operates.¹⁷ What they set out to do was to make the legal systems of Member States more compatible.

The preamble to the Transfers Directive notes that differences in Member States as regards the extent of protection of employees' rights upon transfers of undertakings can have a direct effect on the functioning of the common market and lays out the objective to reduce such differences. "Harmonisation" ideally would lead to the raising of social standards in countries like the UK where these standards had not been advanced. This ideal, according to one view, was hindered by the dominant

¹⁵In order to preserve substantive rights which had been acquired prior to a change of employer, Art. 4 of the Directive introduces a necessary complement to the automatic transfer rule in the form of protection of employees against dismissal which occurs as a result of the transfer itself.

¹⁶Bob Hepple, "Harmonisation of Labour Law in the European Communities," in *Essays for Clive Schmitthof* 14, 28 (J. Adams ed., Abingdon, Oxon. 1983).

¹⁷In one of the most difficult areas of legislation which concerns the allocation of risk of the unavailability of work, there are examples of legislation with ambitious aims which proved to be impossible to achieve. The creation of a right to guaranteed pay for workers laid off because of the unavailability of work did not succeed, mainly because, in the prevailing economic climate, the cost could not be transferred from the state to the employers. In cases such as these the central question is in how far the employee should be liable to suffer loss of earnings, and in how far the cost should be shared by others including the employer, the social security system and the tax-payer. See Bob Simpson, "British Labour Relations in the 1980s: Learning to Live with the Law," 49 *Mod. L. Rev.* 796, 805 (1986); P.L. Davies and M. Freedland, *Labour Law: Text and Materials* 357-362 (2d ed. London 1984).

perspective of the Commission, which was that of European integration and not labour law; the Commission was insensitive to the difficulties of transplanting a practice from one member state to others.¹⁸ In all likelihood, however, the real barrier in the way of achieving social justice had more to do with the type of Directive chosen by the Commission, a Directive treated by the European Court of Justice as a measure of partial harmonisation which does not "aim to establish a uniform level of protection for the entire Community by reference to common criteria."¹⁹ The reason for this approach relates to the fact that labour law, perhaps more than most other areas of the law with which the European Commission is concerned, bears a close relationship to specific national industrial and political traditions. But too much emphasis on the national character had the unfortunate result that the Commission, instead of aiming to establish "fundamental social rights",²⁰ bowed to national law in many important respects, restricted the effectiveness of the Directive and created uncertainty through discordant applications in different Member States.

The objective of the Directive, "to ensure as far as possible the safeguarding of employees' rights in the event of a change of proprietor of the undertaking and to allow them to remain in the service of the new proprietor on the same conditions as those agreed with the vendor,"²¹ is only partially realised, since the Directive provides for nothing more than a level of protection similar to the one employees enjoyed before the transfer. Thus, the European Court of Justice stated that the Directive "can be relied upon only to ensure that the employee is protected in his relations with the transferee to the same extent as he was in his relations with the transferor under the

¹⁸Chris Brewster and Paul Teague, *European Community Social Policy: its impact on the U.K.* 94 (London 1989).

¹⁹*Foreningen af Arbejdsledere i Danmark v. A/S Danmols Inventar*, [1985] E.C.R. 2639 (E.C.J.) describing the Transfers Directive. In *Rask and Christensen v. ISS Kantineservice A/S*, [1993] I.R.L.R. 133 the E.C.J. again made it clear that the aim of the Directive was only partial harmonisation of the law. Only the protection which employees have under the system of their own Member State is transferred in the event of a transfer.

²⁰Not all Directives have been designed like this. Professor Hepple distinguishes between a "fundamental rights" approach, which was followed with regard to the Equal Pay Directive 75/117/EEC (O.J. Eur. Comm. (No. L 45) 19 (1975)) and the Equal Treatment Directive 76/207/EEC (O.J. Eur. Comm. (No. L 39) 40 (1976)), and the "employment law" approach which characterises the Directives on collective redundancies (75/129/EEC), safeguarding of employees' rights in the event of transfers of undertakings (77/187/EEC) and protection of employees in the event of insolvency of their employer (80/987/EEC). See Bob Hepple, "The Implementation of the Community Charter of Fundamental Social Rights," 53 Mod. L. Rev. 643 (1990).

²¹*Foreningen af Arbejdsledere i Danmark v. Daddy's Dance Hall A/S*, [1989] 2 C.M.L.R. 517, 524 (E.C.J.).

legal rules of the Member State concerned."²²

Although it has to be recognised that harmonisation in a Community-wide context poses difficult problems, it is to be regretted that the relatively limited objective of the Directive has in certain instances had the effect of undermining the protection of acquired rights in transfer situations. The problem can be identified as relating not to the principle, but to the application of the principle by the European Court of Justice. The principle that "substantive" rights are to be determined by national law while the Directive covers the protection of "transfer" rights is an acceptable solution to the problem of harmonisation.²³ However, to apply this principle so as to exclude important issues relating to "transfer" rights from the ambit of protection is to reduce the effectiveness of the Directive. Too often, the Court's deference to national law has impeded the proper functioning of the Directive, sometimes even against the intentions of the drafters of the Directive. It was thought originally that all forms of employment relationships would be covered,²⁴ but the European Court failed to carry through with this intent and allowed national law and the "contract of employment" - the existence of which on the date of transfer has been held to be a matter for national law²⁵ - to decide who are "employees."²⁶ In many instances this has had the caustic result of excluding the increasing number of marginal workers, including part-time and temporary workers, from protection. National law also determines the machinery and structural arrangements for workers' representation. In Britain no legal machinery exists for designating workers' representatives and an employer can avoid obligations to inform and consult by simply refusing to recognise trade unions.²⁷

2. Scope

Despite its fairly limited objective, the European Court of Justice has in some ways allowed the Directive a wide scope of application. Article 1 of the Directive states

²²*Id.* at 524-5.

²³Bob Hepple, *Main Shortcomings and Proposals for Revision of Council Directive 77/187/EEC* (December 1990)(Report for the Commission of the European Communities, unpublished).

²⁴*Id.* at 24.

²⁵*Wendelboe v. LJ Music Aps*, [1985] E.C.R. 457 (E.C.J.).

²⁶*Foreningen af Arbejdsledere i Danmark v. A/S Danmols Inventar*, [1985] E.C.R. 2639 (E.C.J.).

²⁷B. Towers, "Derecognising Trade Unions," 19 *Indus. Rel. J.* 181 (1988).

that "this [D]irective shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger." In accordance with the intention expressed in this article, the Court has defined a transfer as not necessarily including a change of ownership, but as covering any situation where, following a legal transfer or merger, there is a change in the natural or legal person who is responsible for carrying on the business and who by virtue of that fact incurs the obligations of an employer towards the employees.²⁸ Consistent with the spirit and purpose of the Directive, a wide interpretation has been given to the term "transfer" and little significance has been attached to the nature of the transaction.²⁹ The Court also extended the scope of the Directive to transfers of only a part of an undertaking, provided that the employees were employed in the transferred part.³⁰ In terms of this definition of a transfer various contingencies do not affect the application of the Directive, for instance the fact that the transaction takes the form of a lease to a new owner who carries on the business without interruption,³¹ or the fact that an interlude occurs after a sale and before trading is resumed.³² Similarly, the Directive has been applied to the transfer of an undertaking under a lease-purchase agreement as well as to the retransfer of the undertaking to the original transferor upon the termination of the lease-purchase agreement by a judicial decision.³³ The fact that a transfer takes place in two stages does not preclude the application of the Directive.³⁴

Two significant judgements of the European Court of Justice in 1992 extended and clarified the meaning of "legal transfer" in the Acquired Rights Directive,³⁵ in a

²⁸*Landsorganisationen i Danmark for Tjenerforbundet i Danmark v. Ny Molle Kro*, [1987] E.C.R. 11 (E.C.J.); *P. Bork International A/S v. Foreningen af Arbejdsledere i Danmark*, [1989] I.R.L.R. 41 (E.C.J.).

²⁹See opinion of Mr. Mancini A-G in *Landsorganisationen i Danmark for Tjenerforbundet i Danmark v. Ny Molle Kro*, [1987] E.C.R. 11 (E.C.J.).

³⁰*Arie Botzen v. Rotterdamsche Droogdok Maatschappij BV*, [1985] E.C.R. 519 (E.C.J.).

³¹*Foreningen af Arbejdsledere i Danmark v. Daddy's Dance Hall A/S*, [1988] E.C.R. 739 (E.C.J.).

³²*Jozef Maria Antonius Spijkers v. Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV*, [1986] E.C.R. 1119 (E.C.J.).

³³*Harry Berg and Johannes Theodorus Maria Busschers v. Ivo Marten Besselsen*, [1989] 3 C.M.L.R. 817 (E.C.J.).

³⁴*P. Bork International A/S v. Foreningen af Arbejdsledere i Danmark*, [1989] I.R.L.R. 41 (E.C.J.).

³⁵Art. 1(1).

way consistent with the aim of protecting employees. In the *Sophie Redmond* case³⁶ a public body had decided to terminate a subsidy to a foundation and to transfer the foundation to another legal person with similar aims. The Court decided that the Directive applied in a situation such as this and stated specifically that transactions arising out of the grant of subsidies to foundations or associations whose services are not remunerated are not excluded from the scope of the Directive.³⁷ The implication is that the Directive can be applied to non-commercial undertakings, provided that the business retains its identity. The second leading case, *Rask and Christensen v. ISS Kantineservice A/S*,³⁸ concerned an agreement between two owners of undertakings to transfer "the responsibility for providing a service," with the second owner subsequently assuming the obligations of an employer in respect of the employees who were engaged in the provision of that service. The Court held, in a decision which could have far-reaching implications for all forms of contracting-out, that the Directive could apply where an employer decided to contract out the running of a staff canteen.

The wide scope of the Acquired Rights Directive was called its "most radical and striking feature."³⁹ The original proposal was based not on company law, but on the law of the enterprise and did not only apply to mergers between companies, but also to takeovers where businesses, their subsidiaries, places of work, or work units were transferred from one person to another with the result that a new employer replaced the previous one. In this way the Directive gave recognition to the continuing vitality of an enterprise, despite changes in ownership of the physical assets. It is unfortunate, however, that in its final form, the Directive did not follow through with its radical new direction and covered only transfers from one person to another but stopped short of including share mergers within its scope. A sale of share capital, although it does not involve a change in the legal identity of the employer, or affect the contractual rights of workers, involves a change in control which may affect the long-term security of the workforce and the role of the union. A new employer who acquires control may introduce new policies that may seriously affect non-contractual

³⁶*Dr Sophie Redmond Stichting v. Bartol*, [1992] I.R.L.R. 366 (E.C.J.).

³⁷*Id.* at 369.

³⁸[1993] I.R.L.R. 133 (E.C.J.).

³⁹Bob Hepple, "Workers' Rights in Mergers and Takeovers: The EEC Proposals," 5 *Indus. L.J.* 197, 205 (1976).

terms and job opportunities.⁴⁰ In principle therefore, at least the provisions relating to consultation and the transfer of collective rights seem as important in this context as in the case of transfers which result in a change of employer.

Another potential limitation of the Directive's scope resulted from an interpretation of the European Court which made a "transfer of an undertaking" subject to the material condition that the economic entity remains in existence.⁴¹ The Court explained that this will be apparent from the fact that its operation is being continued by the new employer, with the same economic or similar activities.⁴² Several factors will be indicative of this fact, for example that the transferee takes over the tangible and intangible assets (know-how, goodwill) from the transferor, employs a majority of the transferor's employees, has the same customers and carries on similar activities. The main problem with this analysis is that it fails to consider a transfer of the assets of a business, or significant changes in the nature of the business by the transfer, which have the result that the employees keep on working for the transferee on the same tools and in the same working environment, but manufacturing different products. Such a situation cannot be brought under the concept of transfer of an "undertaking" because it has generally been assumed in Community law that this concept indicates a continuation of the same economic or commercial activity.⁴³ However, a transfer of a "business" is susceptible to a wider interpretation which would take account of the fact that the working environment in which the employees are engaged remains essentially unchanged, and would emphasise continuity of the

⁴⁰Since, according to legal theory, the company remains the employer, there is no interruption of contract or continuity. However, an argument could be made that an employee should be able to object to a share transfer if the new employer planned changes in contractual terms to the employee's detriment.

⁴¹*Spijkers v. Gebr. Benedik Abattoir CV*, [1986] E.C.R. 1119 (E.C.J.). The Court repeated in *Dr Sophie Redmond Stichting v. Bartol*, [1992] I.R.L.R. 366, 369 (E.C.J.) and in *Rask v. ISS Kantineservice A/S*, [1993] I.R.L.R. 133 (E.C.J.) that the key issue was whether the transfer showed that a business had retained its identity.

⁴²It was again stated in *Dr Sophie Redmond Stichting v. Bartol*, [1992] I.R.L.R. 366, 369 (E.C.J.) that the key issue was whether the transfer showed that a business had retained its identity. In *Rask v. ISS Kantineservice A/S*, [1993] I.R.L.R. 133, the E.C.J. also mentioned that the decisive criterion for establishing whether there is a transfer is whether the business retains its identity, as would be indicated, in particular, by the fact that its operation was either continued or resumed.

⁴³See, e.g., the meaning given to "undertaking" under art. 85(1) of the Treaty Establishing the European Economic Community, Rome, 25 March 1957, *BRT v. SABAM*, [1974] E.C.R. 313 (E.C.J.), per A.G. Mayras; *BNIC v. Clair*, [1985] E.C.R. 391 (E.C.J.), per A.G. Slynn.

workforce as the primary guide to the finding of a relevant transfer.⁴⁴ For this reason Professor Hepple, in his report for the Commission of the European Communities on the shortcomings of the Transfers Directive, proposed that article 1(1) should be amended so as to make it clear that the Directive applies to the transfer of an undertaking, business, or part of a business whether or not the same economic entity continues to exist after the transfer. The suggested wider interpretation of the concept of a transfer, is to a certain extent implied in *Rask v. ISS Kantineservice A/S*⁴⁵ where the emphasis was on the transfer of the responsibility for providing a service and the working environment of the staff, rather than the type of enterprise which was carried on after the transfer, and the customer base. Many instances of subcontracting, such as the contracting out of maintenance or catering services, arguably do not involve the transfer of an economic entity but only the transfer of certain tasks. On the whole, this more specific formulation of the scope of the Directive would better serve the aim of the Directive, which is to safeguard employees' rights in the event of a transfer, and would prevent this aim from being defeated by the commercial form of the transaction.

3. Transfer of rights and obligations

The automatic transfer rule applies to "all the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of the transfer."⁴⁶ Contractual and statutory rights and obligations are clearly covered by this rule and one would hope, for the sake of the continuance of good industrial relations after the transfer, rights and obligations arising from customary industrial practice as well.⁴⁷ Unfortunately, this rule's coverage, through the trepidation of the European Court of Justice to give it its intended effect, has been restricted. The aim of the drafters of the Directive, as reported by one of the

⁴⁴Hugh Collins, "Transfer of Undertakings and Insolvency," 18 Indus. L.J. 144, 154 (1989). *But see* Brian Napier, *CCT, Market Testing and Employment Rights: The Effects of TUPE and the Acquired Rights Directive* 34 (Streatham 1993)(publication sponsored by the Institute of Employment Rights) who is of the opinion that the absence of staff transfers would not be conclusive evidence that no transfer took place. According to him, the fact that a contract makes no provision for staff transfer should not be decisive evidence against the existence of a transfer, since to accept this would make it too simple for the parties to circumvent the social protection of employees by adopting a particular form of agreement.

⁴⁵[1993] I.R.L.R. 133 (E.C.J.).

⁴⁶Art. 3(1).

⁴⁷This is, however, not certain. The first draft of the Directive (COM. No. 74) 351 final, art. 3(1) expressly applied the automatic transfer rule to "rights and obligations arising from customary industrial practice."

committee of independent experts, was to cover all forms of employment relationships and it was thought that the present wording of the Directive would be sufficient to do so.⁴⁸ However, deference to the definitions of national legal systems has become an obstacle to the realisation of this aim and has produced a result that is largely out of touch with the requirements of modern forms of employment.

The Court in *Mikkelsen*⁴⁹ refused to give a general definition to the term "employee", as used in the Directive, and held that this was for national Courts to determine. As a result it has been possible for Member States to ignore the concerns of the drafters of the Directive, to exclude from the protection of the Directive many present-day employment relationships and to allow the traditional "contract of employment" to determine the extent of coverage.⁵⁰ With the changing nature of employment this "figment of the law"⁵¹ has become outdated to the extent that it cannot, even with a wide stretch of the imagination, be made to cover many contemporary, but atypical forms of employment. Two pertinent observations will illustrate the serious need to rethink and to come up with a new statement of meaning of the term "employee". First, the increase in part-time work and temporary work, including that of casual workers and agency-supplied labour, is no longer a new phenomenon and has been well documented.⁵² The growth in flexible employment mostly concerns women who try to fit working hours in with family responsibilities and who should, as much as any other "employee", be able to qualify for employment protection rights.

The second observation concerns the nature of the employer/employee relationship which has traditionally been defined in terms of the "control" exerted by

⁴⁸Bob Hepple, *Main Shortcomings and Proposals for Revision of Council Directive 77/187/EEC* (December 1990)(Report for the Commission of the European Communities, unpublished).

⁴⁹*Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar*, [1985] E.C.R. 2639 (E.C.J.).

⁵⁰There is a wide divergence between the laws of different countries. Whereas the French law has been interpreted to cover most employment relationships, the United Kingdom's Transfer of Undertakings (Protection of Employment) Regulations extend only to a "contract of employment."

⁵¹O. Kahn-Freund, *The Institutions of Private Law and Their Social Functions* 166 (K. Renner ed., London 1949).

⁵²See, e.g., B.A. Hepple, "The Harmonisation of Labour Law in the EEC: A British Perspective," 6 *Recht der Arbeit* 348, 350 (1989). He mentions that in the United Kingdom, from March 1983 to March 1988 there was a growth of nearly 4.3% in the full-time workforce and a growth of 28.2% in the part-time workforce. In 1951 part-timers constituted 4% of all those in employment; by 1987 they were 23% of those in work and more than four-fifths of these were women.

the employer. This "control relationship" dominated the thoughts expressed by Advocate General Slynn in *Mikkelsen* concerning a possible definition of the term "employee". He suggested that, should the need for a Community-wide definition of this term arise, an acceptable definition of employee would be "one who in return for remuneration agrees to work for another and who can as a matter of law be directed as to what he does and how he does it, whether pursuant to a contract of employment or employment relationship." Elaborating further on the matter of "control" he stated that "the question is whether the individual concerned has bound himself, or put himself into an employment relationship where he can be required to carry out instructions pursuant to that contract or relationship. The question in each case is whether he is subject to control...".

This definition can be criticised on the basis that while historically "control" may have characterised the employment relationship, and probably still does in professions which require a limited amount of expertise, this is no longer true for the work performed by the highly-skilled or professional worker who is the sole judge of "how" tasks should be performed. Because the "control" test is difficult, if not impossible to apply in relation to many modern employment relationships, Professor Hepple suggested that transfer rights should apply to all those in gainful employment whatever the precise legal form of the relationship. He suggested that an employment relationship be defined as "any agreement in return for gain to do or perform personally any work or services for another person."⁵³

The rights and obligations which are transferred, are those "existing on the date of the transfer." For a while there was uncertainty whether "date" meant "moment" of the transfer,⁵⁴ but since the decision in *Bork International*⁵⁵ this doubt is of no great consequence. The Court decided that workers who were dismissed as a result of the transfer, and therefore in contravention of article 4(1) of the Directive, must be

⁵³Bob Hepple, *Main Shortcomings and Proposals for Revision of Council Directive 77/187/EEC 75* (December 1990)(Report for the Commission of the European Communities, unpublished). This suggestion only follows the Community rules on free movement which apply to all those in gainful employment, with the exclusion of those who work for only a few hours or days and those not engaged in economic activities, for example amateur sports players.

⁵⁴In *Knud Wendelboe v. L.J. Music ApS*, [1985] E.C.R. 457 (E.C.J.) and *Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar*, [1985] E.C.R. 2639 (E.C.J.) the question did not arise for immediate decision but A.G.Slynn was of the opinion that the words "date" and "time" or "moment" were interchangeable.

⁵⁵*P. Bork International A/S v. Foreningen af Arbejdsledere i Danmark*, [1989] I.R.L.R. 41 (E.C.J.).

considered as still employed by the undertaking on the date of the transfer. All the transferor's obligations towards them in such a situation are transferred to the transferee. In the case of a valid dismissal, however, no rights and obligations exist on the date of a transfer and the automatic transfer rule does not apply.

Liability in respect of rights and obligations generally extends to the transferee, although the Directive allows member states the option to hold the transferor and transferee jointly liable.⁵⁶ In all circumstances excluding insolvency, this option provides for a fair allocation of responsibility and seems the desired course to take, even though it may be necessary to limit the transferor's liability to obligations which arose in the period of one year immediately before the transfer,⁵⁷ and to impose a time limit for liability.⁵⁸

4. Consent

The Directive does not make it clear whether the protection of acquired rights of employees necessarily implies that employees' traditional freedom of contract, which the English case of *Nokes v. Doncaster Amalgamated Collieries Ltd.*⁵⁹ so emphatically defended, cannot be maintained. In the majority of cases, employees will be concerned with the continuation of employment and the issue of a choice to the contrary will therefore not arise. Relatively few employees show great concern for their traditional freedom of contract in the event of a transfer, and most employees, instead of abandoning the transferee's employment have a deep-seated interest in keeping their jobs. However, occasionally an employee may wish to object to the transfer of the employment relationship to a new employer, and the European Court, in fact, has had to decide two such cases, *Berg, Busschers, Besselsen*⁶⁰ and recently, *Katsikas v. Konstantinidis*⁶¹

⁵⁶Art. 3(1) para. 2.

⁵⁷Bob Hepple, *Main Shortcomings and Proposals for Revision of Council Directive 77/187/EEC* 81 (December 1990)(Report for the Commission of the European Communities, unpublished).

⁵⁸In the Netherlands and Germany the time limit is one year from the date of transfer, and in Spain three years.

⁵⁹[1940] App. Cas. 1014 (H.L.).

⁶⁰*Harry Berg and Johannes Theodorus Maria Busschers v. Ivo Marten Besselsen*, [1989] 3 C.M.L.R. 817 (E.C.J.).

⁶¹[1993] I.R.L.R. 179 (E.C.J.).

In *Berg* the employees argued that it was not possible to transfer the transferor's obligations to them to another without their consent. Logically, their argument has some merit if one considers that an employer who wishes to acquire a business has complete freedom to obtain information about the staff before deciding to purchase the undertaking. The employees, on the other hand, have no choice regarding the identity of the transferee. Moreover, it is a well established principle in international labour law that labour is not a commodity⁶² and employees should therefore be protected from being sold or transferred involuntarily.

The Court came to a different conclusion, however, stating that:

"this [D]irective is intended to safeguard the rights of workers in the event of a change of employer by making it possible for them to continue to work for the transferee under the same conditions as those agreed with the transferor. Its purpose is not, however, to ensure that the contract of employment or the employment relationship with the transferor is continued where the undertaking's employees do not wish to remain in the transferee's employ".⁶³

According to the Court, the transferor is released from his obligations as an employer solely by reason of the transfer (unless Member States provide for joint liability of the transferor and transferee following the transfer) and this legal consequence is not conditional on the consent of the employees concerned. The most obvious reason for the Court's preference can be found in the dual concern of the Directive with capital mobility and employment protection.⁶⁴ At the same time it is fair to wonder about the necessity of rescinding a basic common law right which employees will wish to exercise in a minority of cases, and to be wary of any inclination towards a new regime of serfdom, especially since the likelihood is small that a ruling which permitted employees to object to a transfer in good time would have been a big obstacle to

⁶²The Constitution of the International Labour Organization, 1919, Art. 41.

⁶³*Harry Berg and Johannes Theodorus Maria Busschers v. Ivo Marten Besselsen*, [1989] 3 C.M.L.R. 817, 826 (E.C.J.).

⁶⁴This deviation from earlier opinion seems to be best explained by the dual concern which Advocate General Mancini stated explicitly in his opinion when he expressed the fear that the purpose of the Directive - "to facilitate mobility of enterprises while protecting the rights of their staff - would be frustrated by the necessity of obtaining the consent of all employees concerned." (*Harry Berg and Johannes Theodorus Maria Busschers v. Ivo Marten Besselsen*, [1989] 3 C.M.L.R. 817, 821 (E.C.J.)). His statement reminds us of the two sides of the Directive, which Davies calls the "employment protection side" and the "business promotion side." (P.L. Davies, "Acquired Rights, Creditors' Rights, Freedom of Contract, and Industrial Democracy", 9 Y.B. Eur. L. 21, 50 (1989)). The Social Action Programme, as much as it was concerned with the elimination of costly injustices to workers, also anticipated that the protection of acquired rights should not hinder the mobility and integration of capital, and against this background the Court's support for the facilitation of business transfers is understandable.

capital concentrations.⁶⁵ It seems to be a retrogressive step to limit employees' choice to only two options: a right to claim constructive dismissal in instances of transfer resulting in a substantial change in working conditions which is to their detriment, as provided for in Article 4(2) of the Directive, or freedom to terminate the employment relationship in terms of the contract. The first option requires specific proof of significant and detrimental changes and does not apply to objections based on the identity of the employer. The unilateral freedom allowed under the second option is inadequate in that an employee cannot claim compensation from an employer, be it the transferor or transferee.

The basis for the objections which could have been raised against the *Berg* decision has recently been removed by the decision of the European Court in *Katsikas v. Konstantinidis* which puts the *Berg* decision in perspective. The Court interpreted *Berg* as not meaning that an employee employed by the transferor at the date of the transfer of the undertaking is precluded from objecting to the transfer to the transferee of the employee's contract of employment or employment relationship. Implanted notions of the non-assignability of employment contracts find expression in the Court's opinion that the Directive cannot be interpreted as obliging the employee to continue the employment relationship with the transferee. The Court perceived that the imposition of such an obligation would undermine the fundamental rights of the employee who must be free to choose an employer and cannot be obliged to work for an employer that the employee has not freely chosen. According to the Court, it is for Member States to decide the fate of the contract of employment or of the employment relationship in cases where the employee do not wish to remain in the transferee's employ. The contract can either be seen as repudiated, or as to be continued with the transferor.

5. Collective provisions

The individual provisions of the Directive are complemented by the collective provisions which seek to warrant the continued application of collectively agreed terms

⁶⁵Professor Hepple's recommendation in his report for the Commission of the European Communities was that the contract of employment or employment relationship should not be transferred if the employee objected to such transfer in good time. (Bob Hepple, *Main Shortcomings and Proposals for Revision of Council Directive 77/187/EEC* (December 1990)(Report for the Commission of the European Communities, unpublished)).

and conditions by the transferee, for a period of not less than one year.⁶⁶ Within this time the transferee and employee representatives can negotiate a new agreement -- which may be desirable, especially if conditions have to correlate with those of employees already employed by the transferee -- but in the meantime employees whose contract of employment or employment relationship is in existence at the time of the transfer will enjoy terms which are no less favorable than those which apply at the date of transfer.⁶⁷

The collective aspect of the Directive also extends to protection for employee representatives, whose status and function, as laid down by the laws, regulations or administrative provisions of the Member States, will be preserved, but only if "the business preserves its autonomy" after the transfer.⁶⁸ This means that the protection will fall away when a business becomes part of a bigger economic entity. A more comprehensive, and not necessarily very cumbersome, protection would have been to allow employee representatives of the transferred or controlled undertaking to continue to operate with representatives of employees in the new undertaking.⁶⁹

6. Protection against dismissal

The automatic transfer provisions acquire their full force through Article 4 which prohibits the dismissal of an employee before or after the transfer. However, the provision that the transfer "shall not in itself constitute grounds for dismissal by the transferor or transferee" is qualified to permit "dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce." This potentially wide exemption was obviously introduced so as not to weigh down the conduct of business and obstruct mergers and takeovers which may occur as part of such conduct. But a careful interpretation of permissible reasons for dismissal is of the utmost importance for retaining the effect of acquired rights protection, and the just fear is that this exemption will eat away the protection. The European Court of Justice,

⁶⁶Art. 3(2).

⁶⁷*Landsorganisationen i Danmark for Tjenerforbundet i Danmark v. Ny Mølle Kro*, [1987] E.C.R. 11 (E.C.J.).

⁶⁸Art. 5(1).

⁶⁹Professor Hepple proposed that the existing provisions be amended to this effect. (Bob Hepple, *Main Shortcomings and Proposals for Revision of Council Directive 77/187/EEC* (December 1990)(Report for the Commission of the European Communities, unpublished)).

in the *Bork* case,⁷⁰ has given some guidance on the interpretation of "economic" and stated that "account must be taken of all the objective circumstances in which the dismissal occurred, and, in particular ... the fact that it took place on a date close to that of the transfer and that the workers concerned were re-engaged by the transferee." Such an occurrence will lead to the inference that the dismissal was not an "economic" one, but was connected to the transfer. The Court also made the critical observation that:

"workers employed by the undertaking whose contract of employment or employment relationship has been terminated with effect on a date before that of the transfer, in breach of Article 4(1) of the Directive, must be considered as still employed by the undertaking on the date of the transfer with the consequence, in particular, that the obligations of an employer towards them are fully transferred from the transferor to the transferee, in accordance with Article 3(1) of the Directive."

Although the Court in the *Bork* case hinted at an objective standard for determining "economic" reasons for dismissal, it is submitted that it did not go far enough in explaining the level of penetration of such a standard. Does objectivity require a tribunal to examine an employer's financial position and prospects in order to decide whether dismissals were economically justified, or is it sufficient to accept the employer's subjective judgment in this regard? The latter interpretation will only leave a tribunal with the task of determining whether the employer's decision necessarily resulted in changes in the numbers or functions of the workforce, without questioning the evidence on which such a decision was based so as to evaluate the decision itself. If tribunals are unwilling to penetrate the employer's decision, at least to the extent of examining evidence that the employer was motivated by an economic, technical or operational reason, the permitted exemption can easily destroy the primary aim of the Directive and devour much of the protection of job security.

Implementation of the Transfers Directive in the UK

Implementing legislation for the Transfers Directive in the United Kingdom was finally adopted in 1981, with a "remarkable lack of enthusiasm", as the responsible minister himself pointed out.⁷¹ The policy of the Conservative Government which came into power in May 1979 had been to resist, and determinedly attack, Community regulation as burdens for the development of new forms of employment and business efficiency. Subordinate, and not primary, legislation was chosen to implement the

⁷⁰*P. Bork International A/S v. Foreningen af Arbejdsledere i Danmark*, [1989] I.R.L.R. 41, 44 (E.C.J.).

⁷¹14 Parl. Deb., H.C. (6th ser.) cols. 677, 680, 695, 696 (December 7, 1981).

Directive, with several unfortunate consequences, due to the fact that the scope had to be limited to avoid the risks of challenges on grounds of ultra vires, and that no textual changes could be made to existing legislation. The introduction of subordinate legislation also meant that there was limited discussion and no possibility of amendment by Parliament.

Several provisions of the Transfer of Undertakings (Protection of Employment) Regulations 1981⁷² evidenced a want of sympathy for the Directive and, as such, were applied for over a decade. In 1992, however, the European Commission, in a report on the treatment of the Acquired Rights Directive in different Member States,⁷³ criticized aspects of the UK's Regulations which did not conform adequately with the Directive,⁷⁴ and initiated proceedings against the UK before the European Court of Justice. The UK Government subsequently gave an undertaking to make most of the required changes to the law,⁷⁵ and, in November 1992, introduced the Trade Union Reform and Employment Rights Bill (TURER) into Parliament.

1. Application

The Regulations apply to a transfer of an undertaking from one person to another, and declare that a transfer may be effected by a series of two or more transactions between the same parties, whether or not any property is transferred to the transferee by the transferor.⁷⁶ The test used in the UK to determine the existence

⁷²S.I. 1981, No. 1794 as amended in minor respects by S.I. 1987, No. 442 (TUPE), made under sec. 2(2) of the European Communities Act 1972 which authorises the Crown in Council and any designated Minister or Department by regulations to make provision:

(i) to put into effect those treaty and other obligations which are not directly applicable or effective by virtue of section 2(1); and

(ii) to fill out and to make specific provision within the context and limits of UK law those Treaty and other Community obligations which are directly applicable or effective...

⁷³*Commission Report to the Council* (adopted on 2 June 1992) on progress with regard to the implementation of Directive 77/187/EEC relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses. See Brian Napier, *CCT, Market Testing and Employment Rights: The Effects of TUPE and the Acquired Rights Directive* 9 (Streatham 1993) (publication sponsored by the Institute of Employment Rights).

⁷⁴The five main points of criticism concerned the British system for appointing workers' representatives, the requirement that the transferor had to be the owner of the undertaking, the exclusion of undertakings not in the nature of a commercial venture, inadequate sanctions and the weak consultation requirement which omitted to state that consultation had to be "with a view to seeking agreement" as required by art. 6(2) of the Directive.

⁷⁵With the exception of changing the system for appointing workers' representatives.

⁷⁶TUPE 1981, Regulations 3(1) and 3(4), as amended by TURER 1993, sec. 32(3).

of a transfer corresponds in broad terms to the interpretation of the Directive. UK Courts have accepted the requirement that an economic entity retains its identity and have taken factors such as the effects of the transfer with regard to the assets, staff, customers and the type of enterprise into account. Courts have excluded a transfer of assets alone⁷⁷ unless such assets constitute the essence of the business.⁷⁸ It can be expected that a transfer incorporating all the criteria will most probably be regarded as a relevant transfer. Between these extremes many variations can occur and it is possible, given the indeterminate nature of the criteria, that under certain circumstances a transfer of a majority of employees to the transferee will not be covered, although a strong argument could certainly be made that such a possibility is at odds with the clearly stated purpose of the Directive which is to protect the interests of employees.⁷⁹

Where the UK Regulations at first only applied to ownership transfers⁸⁰ the TURER amendments make it clear that a change of ownership is not required in order to find a relevant transfer.⁸¹ Decided cases in the United Kingdom which suggested that the Regulations only applied to transfers involving a change of ownership are now clearly of no significance. Decisions by the Courts which excluded franchising and sub-contracting arrangements in every instance where the franchisor, sub-contractor or transferor did not in effect own the business or part of a business which was being transferred,⁸² or which denied employees protection when a transferee acquired possession of a business and started to run it before the change of ownership occurred,⁸³ and also when a franchise was surrendered and re-granted without there

⁷⁷*Melon v. Hector Powe Ltd.*, [1981] I.C.R. 43 (H.L.).

⁷⁸*Lloyd v. Brassey*, [1969] 2 Q.B. 98 (C.A.).

⁷⁹See, e.g., *Abels v. Bestuur van de Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie*, [1985] E.C.R. 469, 484 (E.C.J.); *Harry Berg and Johannes Theodorus Maria Busschers v. Ivo Marten Besselsen*, [1989] 3 C.M.L.R. 817 (E.C.J.).

⁸⁰*Brook Lane Finance v. Bradley*, [1988] I.R.L.R. 283 (E.A.T.); *Robert Seligman Corp v. Baker*, [1983] I.C.R. 770 (E.A.T.).

⁸¹TURER 1993, sec. 32(3).

⁸²*Robert Seligman Corp. v. Baker*, [1983] I.C.R. 770 (E.A.T.); *Hadden v. University of Dundee Students Association*, [1985] I.R.L.R. 449 (E.A.T.).

⁸³*Brook Lane Finance v. Bradley*, [1988] I.R.L.R. 283 (E.A.T.).

being any transfer of goodwill,⁸⁴ now have to be read in the light of the latest amendments to the law and the guidance of the European Court of Justice in *Rask v. ISS Kantineservice A/S*.⁸⁵ There is no basis for making ownership of goodwill or premises a prerequisite for the transfer of an "economic entity", and for excluding employees working for a subcontractor or licensee from the protection of acquired rights. Limiting transfer protection in this way is neither justified nor authorised by the Transfers Directive, which suggests that protection should extend to transfers of employer. It may even be necessary to rethink the use of the term "employer", which is normally a "mystification of reality", as Lord Wedderburn pointed out,⁸⁶ and to concentrate more on centres of decision and of power.⁸⁷

The UK Regulations, before the amendments in TURER, did not apply to transfers of undertakings "not in the nature of a commercial venture."⁸⁸ It was generally understood that this exclusion applied to all ventures in which capital was not invested with a view to profit and a risk of loss. On the basis of this interpretation Courts excluded any undertakings not interested in financial gain, for example a Quaker school⁸⁹ and a student cafeteria⁹⁰ which aimed at breaking even. Similarly, the contracting out of a catering service by a public body, which was operated commercially after the transaction, was held not to be in the nature of a commercial venture.⁹¹ Since the Directive applies to the transfer of a "business",⁹² and therefore arguably to all economic activities, serious questions were raised with regard to the

⁸⁴*Robert Seligman Corp v. Baker*, [1983] I.C.R. 770 (E.A.T.). In *Stirling v. Dietsmann Management Systems Ltd.*, [1991] I.R.L.R. 368 (E.A.T.), the absence of transfer of either physical assets or goodwill was held to preclude the application of the Regulations.

⁸⁵[1993] I.R.L.R. 133 (E.C.J.).

⁸⁶Lord Wedderburn, "Labour Law: Autonomy from the Common Law?," 9 Comp. Lab. L.J. 219, 243 (1987).

⁸⁷See Lord Wedderburn, "Labour Law: Autonomy from the Common Law?," 9 Comp. Lab. L.J. 219, 243 (1987), quoting Gerard Lyon-Caen, "Du Role des Principes Generaux du Droit Civil en Droit du Travail (Premiere Approche)," Rev. Trimestrielle de Droit Civil 229, 231 (1974).

⁸⁸TUPE 1981, Regulation 2(1). This exclusion was removed by TURER Act 1993 sec. 32(2).

⁸⁹*Woodcock v. Friends School of Wigton*, [1987] I.R.L.R. 98 (C.A.).

⁹⁰*Hadden v. University of Dundee Students' Association*, [1985] I.R.L.R. 449 (E.A.T.).

⁹¹*Expro Services Ltd. v. Smith*, [1991] I.R.L.R. 156 (E.A.T.).

⁹²Art. 1(1).

UK Regulations' consistency with the objectives of the Directive.⁹³ Subsequent disapproval came from the European Commission which, in its 1992 report,⁹⁴ criticized the exclusion of undertakings "not in the nature of a commercial venture" as being an unacceptable diversion from the Directive. The Government, while denying that it did not comply with Community obligations, finally removed this exclusion.

The "commercial venture" requirement has been particularly controversial because of its potential to exclude all kinds of "privatisation" exercises of Government.⁹⁵ Privatisation of both central and local Government services has been a central pillar of Conservative economic policy since the 1980s. Areas ranging from refuse collection to management of prisons, from provision of health services to computer operations, have been affected by the policy, with the aim of subjecting such services to the competition of the market and to offer best value for money. The Government's privatisation programme,⁹⁶ rests on the assumption that "[t]he free operation of the market is the best way of delivering greater choice, higher productivity and better quality services at lower prices."⁹⁷ In the vigorous pursuit of this liberal economic idea, the Government tends to disregard the incongruity which often exists between the goals of greater efficiency and cost savings, and pays no heed to criticisms of those who point to a deterioration of both the quality of services and employment conditions of employees.⁹⁸

Lately, there has been renewed interest and debate, with occasional

⁹³Bob Hepple and Angela Byre, *The Application of EEC Labour Law in the United Kingdom* (September 1988)(Study commissioned by the Directorate General for Employment, Social Affairs and Education of the Commission of the European Communities); R.W. Rideout, "The Great Transfer of Employee Rights Hoax," 35 *Current Legal Probs.* 236 (1982).

⁹⁴*Commission Report to the Council* (adopted on 2 June 1992) on progress with regard to the implementation of Directive 77/187/EEC relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.

⁹⁵Brian Napier, *CCT, Market Testing and Employment Rights: The Effects of TUPE and the Acquired Rights Directive* 5 (Streatham 1993)(publication sponsored by the Institute of Employment Rights).

⁹⁶The programme is known by various names such as "facilities management" (usually referring to contracting-out of a particular service), "compulsory competitive tendering" (CCT) (referring to the provision of local Government services), "market testing" (referring to the provision of central Government services).

⁹⁷See Brian Napier, *CCT, Market Testing and Employment Rights: The Effects of TUPE and the Acquired Rights Directive* 1 (Streatham 1993)(publication sponsored by the Institute of Employment Rights), quoting Secretary of State for the Environment, 119 *Parl. Deb.*, H.C. col. 80.

⁹⁸See Brian Napier, *CCT, Market Testing and Employment Rights: The Effects of TUPE and the Acquired Rights Directive* 2 (Streatham 1993)(publication sponsored by the Institute of Employment Rights), quoting *Privatisation, Disaster for Quality*, Public Services Privatisation Research Unit (March 1992).

expressions of outrage or expectancy, over the application of the Transfer Regulations. The Government has continued to express a firm belief in the beneficial operation of market forces and has sought to deny that the latest legal developments will seriously impede its programme.⁹⁹ Employers, however, have expressed disquiet about the anti-competitive aspects of the Transfer Regulations which could make it too expensive for small contractors to bid for contracts when they have to maintain existing conditions of employment for employees.¹⁰⁰ These views do not take into account the factor that resources typically move from the public to the private sector with potentially powerful consequences for the rights of employees.¹⁰¹ The most weighty consideration for employees is the almost inevitable reduction in labour costs which follows most privatisation exercises and which means either a substantial worsening of employment conditions for employees who continue to work in the operation, or staff redundancies.

Were it not for the fact that the relationship between privatisation and employment protection rights is to a certain extent controlled by Community law and therefore outside the Government's exclusive authority, the repercussions which the transfer from public to private sector has for the rights of employees would probably never have been discussed at Government level. However, the Government has been forced to pay attention because of the way in which the case law of the European Court of Justice has developed. Cases suggest that the reach of the Directive may extend to public sector transfers of undertakings which are regarded as non-commercial,¹⁰² as well as to the contracting-out of services.¹⁰³ In addition, the

⁹⁹In a statement made by Mr. Michael Forsyth, Minister of State, Department of Employment, on Trade Union Reform and Employment Rights Bill, 214 Parl. Deb., H.C. (6th series) col. 340 (19 November 1992), he implied that all along the TUPE Regulations had applied to the public sector ("The fact is that the Regulations have always covered the public sector."). Mr Waldegrave, a senior minister, has stated that the general position in relation to market testing is unaffected by recent decisions of the E.C.J., 216 Parl. Deb., H.C. (6th series) col. 537 (11 January 1993).

¹⁰⁰See Brian Napier, *CCT, Market Testing and Employment Rights: The Effects of TUPE and the Acquired Rights Directive* 10 (Streatham 1993) (publication sponsored by the Institute of Employment Rights) who refers to reports of several contractors such as Paul Gosling, "Contracting out - into Trouble," *The Independent* (12 November 1992), and Alan Millar in *Com. Motor* (7-13 January 1993).

¹⁰¹The significance of market testing on employment rights was the subject of a study by Professor Brian Napier. In *CCT, Market Testing and Employment Rights: The Effects of TUPE and the Acquired Rights Directive* (Streatham 1993) (publication sponsored by the Institute of Employment Rights) Professor Napier's specific concern was with how the regulatory framework of employment law, operating at both the domestic and the European Community level, applies to the transfer of staff from public to private sector employment.

¹⁰²*Dr Sophie Redmond Stichting v. Bartol*, [1992] I.R.L.R. 366 (E.C.J.).

European Court of Justice provided an opening for an employee to object to being transferred, and even, if a Member State decides to allow this option, to continue the contract of employment with the transferor.¹⁰⁴ The latest cases confirm the sentiment that a proper interpretation of the Directive has to be teleological rather than historical,¹⁰⁵ and consistent with the aim of employee protection.¹⁰⁶ On one occasion, the Advocate General made the remark that the primary aim of the Directive was to prevent the process of restructuring of firms being carried out to the detriment of employees.¹⁰⁷ In another case the Advocate General (Van Gerven) pointed out that the Directive has to be interpreted against the background of Article 117 of the EEC Treaty, "to promote improved working conditions and an improved standard of living for workers."¹⁰⁸ Since Courts in the UK have an obligation to give a purposeful construction to the Regulations, the decisions of the European Court of Justice can have a considerable impact. The latest decisions, in combination with amending legislation, will force Courts in the UK to adopt a less restrictive approach than previously to the Regulations. It is clear that many public sector transfers, even though they are not "commercial," fall within the scope of the Directive.¹⁰⁹ The scope is narrowed mainly by the requirement that there must be a retention of identity, as this appears from all the factual circumstances of the transaction.¹¹⁰

¹⁰³(...continued)

¹⁰³*Rask and Christensen v. ISS Kantineservice A/S*, [1993] I.R.L.R. 133 (E.C.J.).

¹⁰⁴*Katsikas v. Konstantinidis*, [1993] I.R.L.R. 179 (E.C.J.). The European Court left it for domestic law to determine whether the contract with the transferor continues or not. The UK Government's choice is to regard the contract as terminated and it ruled out the possibility that an employee's objection be treated as a dismissal which would give rise to a redundancy entitlement.

¹⁰⁵In *R. v. Henn*, [1981] App. Cas. 850 (H.L.), Lord Diplock made the remark: "The European Court, in contrast to the English Courts, applies teleological rather than historical methods to the interpretation of the Treaties and other Community legislation. It seeks to give effect to what it conceives to be the spirit rather than the letter of the Treaties."

¹⁰⁶This thought influenced, e.g. *Abels v. Bestuur van de Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie*, [1985] E.C.R. 469 (E.C.J.); *Harry Berg and Johannes Theodorus Maria Busschers v. Ivo Marten Besselsen*, [1989] 3 C.M.L.R. 817 (E.C.J.).

¹⁰⁷Advocate General (Van Gerven) in *Dr Sophie Redmond Stichting v. Bartol*, [1992] I.R.L.R. 366 (E.C.J.).

¹⁰⁸*D'Urso v. Ercole Marelli Elettromeccanica Generale SpA*, [1992] I.R.L.R. 136 (E.C.J.).

¹⁰⁹In *Dr Sophie Redmond Stichting v. Bartol*, [1992] I.R.L.R. 366 (E.C.J.), the E.C.J. held that the Directive was capable of applying to transfers of undertakings which were financed by means of public subsidies.

¹¹⁰The most important decision is probably *Spijkers v. Gebroeders Benedik Abattoir C.V.*, [1986] 2 C.M.L.R. 296 (E.C.J.).

2. Dismissals arising in the context of a business transfer

Regulation 5(1) prevents a transfer from operating so as to terminate the contract of employment of any employee. This provision has not been easy to apply, primarily because of uncertainty as to which employees are subject to compulsory transfer. For many years the most seriously debated judicial question regarding the individual transfer provisions concerned the Regulation which states that the persons whose contracts are transferred are those "employed immediately before the transfer."¹¹¹ The question had the potential to render the automatic transfer provisions powerless if the Courts were to decide that employees who were dismissed before the transfer did not qualify for protection because they were not employed immediately before the transfer. In a series of alarming decisions this view held sway in Courts of first appeal¹¹² until the House of Lords finally restored the protection which the compulsory transfer of contracts of employment was intended to convey. The *Litster*¹¹³ case concerned the dismissal of employees by the transferor an hour before the completion of the transfer. It was convincingly argued that the drafters of the Regulations could hardly have "contemplated that, where the only reason for the termination of the employment is the transfer of the undertaking... the parties to the transfer would be at liberty to avoid the manifest purpose of the Directive by the simple expedient of wrongfully dismissing the workforce a few minutes before the completion of the transfer."¹¹⁴ The House of Lords accepted this purposive interpretation of the Regulations¹¹⁵ and ruled accordingly that employees who were unfairly dismissed as a result of the transfer, had to be treated as still employed and therefore subject to the automatic transfer provisions.¹¹⁶ The method by which this conclusion was reached is interesting, especially since there was no clear ambiguity in the UK Regulations. In the light of the European law and the decision of the European Court

¹¹¹TUPE 1981, Regulation 5(3).

¹¹²*Secretary of State v. Spence*, [1986] I.C.R. 651 (C.A.); *Forth Estuary Engineering v. Litster*, [1988] I.R.L.R. 289 (C.A.); *Wheeler v. Patel*, [1987] I.C.R. 631 (E.A.T.).

¹¹³*Litster v. Forth Dry Dock and Engineering Company*, [1989] I.C.R. 341 (H.L.). See Hugh Collins, "Transfer of Undertakings and Insolvency," 18 Indus. L.J. 144 (1989).

¹¹⁴[1989] I.C.R. 341, 357 (H.L.).

¹¹⁵See Bob Hepple and Angela Byre, "EEC Labour Law in the United Kingdom - A New Approach," 18 Indus. L.J. 129 (1989) regarding the "purposive construction" of United Kingdom legislation.

¹¹⁶[1989] I.C.R. 341, 371 (H.L.).

in the *Bork*¹¹⁷ case the House of Lords was willing to accept that the legislation could "reasonably be construed" to bear the given meaning and stated: "In effect this involves reading Regulation 5(3) as if there were inserted after the words "immediately before the transfer" the words "or would have been so employed if he had not been unfairly dismissed".¹¹⁸ A purposive interpretation of the Regulations has since been endorsed in the Community decision in *Marleasing SA v. La Comercial Internacional de Alimentacion SA*,¹¹⁹ and applied by the House of Lords in *Webb v. EMO (Air Cargo) UK Ltd.*,¹²⁰ with the important qualification, though, that the *Marleasing* doctrine cannot help where there is a direct conflict between a UK statute and Community law.

3. Dismissal for an economic, technical or organisational reason

The *Litster* case restored the provision that any dismissal connected with a relevant transfer is automatically unfair to its full meaning.¹²¹ However, concern that employers may find the effect of the rule too cumbersome, for instance in the case of genuine redundancies in the context of business transfers, led to the inclusion of a broadly formulated exception. Following the wording of the Directive, the UK Regulations permit dismissals for economic, technical or organisational reasons but require that such dismissals satisfy the ordinary test for unfair dismissals.¹²²

A case of unfair dismissal usually involves a two phase procedure. After an employer has proven to an industrial tribunal the reasons for the dismissal, the tribunal will proceed to consider "whether in the circumstances the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee."¹²³ Potentially fair reasons for dismissal may relate to conduct, capability, redundancy,

¹¹⁷*P. Bork International A/S v. Foreningen af Arbejdsledere i Danmark*, [1989] I.R.L.R. 41 (E.C.J.).

¹¹⁸*Litster v. Forth Dry Dock and Engineering Company*, [1989] I.C.R. 341, 371 (H.L.).

¹¹⁹*Marleasing SA v. La Comercial Internacional de Alimentacion SA*, [1992] 1 C.M.L.R. 305 (E.C.J.).

¹²⁰[1993] I.R.L.R. 27 (H.L.).

¹²¹Regulation 8(1).

¹²²TUPE 1981, Regulations 8(1) and 8(2), incorporating secs. 57(1) and 57(3) of the EP(C)A 1978.

¹²³Sec. 57(3) of EP(C)A 1978.

illegality, or "some other substantial reason of a kind such as to justify the dismissal."¹²⁴ It is expressly provided that a dismissal for an "economic, technical or organisational reason" will fall under this last comprehensive heading which serves as a wide categorisation for reasons which do not fall within the first four categories but is nonetheless of a kind which could justify dismissal.

Ultimately, the fairness of a dismissal will depend upon an interpretation of an "economic, technical or organisational reason entailing changes in the workforce." One interpretation by the Employment Appeal Tribunal gives some hope that the exception will be construed narrowly. If the present view of the Employment Appeal Tribunal in England prevails, dismissals of the workforce for the purpose of disposing of the business, at the insistence of the transferee or to secure a better deal, will not constitute an "economic" reason, but only dismissals which arise during the conduct of the business, including therefore most genuine redundancies.¹²⁵ Another hopeful signal was given by the Court of Appeal in *Berriman v. Delabole Slate Ltd.*¹²⁶ when it interpreted the concept of "entailing a change in the workforce" as requiring that the change in the function or composition of the workforce should be a necessary, and not simply a possible, consequence of the employer's "economic, technical or organisational" decision.¹²⁷ In this case the employee refused to accept changes in terms and conditions which the transferee wanted in order to standardise terms and conditions for all workers in his employment.

These judicial interpretations of the Regulations, recognising that automatic transfer of employment would be of little benefit if either the transferor or transferee were free to dismiss employees for reasons which are directly or indirectly linked to the transfer, contribute towards the stated aim of safeguarding employee rights. There is reason for concern, though. In general, employers are given relative freedom to dismiss for reasons of "business efficiency" and tribunals have shown an unwillingness to examine the economic reasons proffered by an employer while accepting the

¹²⁴Secs. 57(1) & (2) of EP(C)A 1978.

¹²⁵*Wheeler v. Patel*, [1987] I.C.R. 631 (E.A.T.).

¹²⁶[1985] I.C.R. 546, 550-1 (C.A.).

¹²⁷For a discussion of this case, see John McMullen, "Management Prerogative, Reorganisation and Employees' Rights on Transfers of Undertakings," 49 Mod. L. Rev. 524-529 (1986).

employer's prerogative to make financial decisions.¹²⁸ If the same reticence to interfere in the exercise of this kind of managerial prerogative appears with regard to transfers, the dangers remain that tribunals will be unwilling to assess the employer's decision to dismiss employees for economic reasons, and that the exemption will provide a wide escape avenue which may be used to undermine the presumption that dismissal for a reason connected with the transfer is unfair.

Redundancy and reorganisation

Situations of redundancy and reorganisation, like transfer situations, are characterised by managerial decisions regarding organisational changes which may present dangers for the rights of employees. The Redundancy Payments Act 1965 was introduced to provide for financial compensation for employees who lost their jobs because an employer's need for them declined or ceased. This Act, as the first real piece of statutory employment protection, signified a change from previous legislation which had always concerned adjustments to the common law of the contract of employment, and paved the way for the introduction of unfair dismissal legislation.¹²⁹

One explanation for the introduction of a scheme of financial compensation for workers has an equitable basis. In the United Kingdom, as in other countries in Europe, employers, Governments and workers increasingly came "to accept that the negative consequences of economic and technological change should be more equitably shared among employers, workers and the community."¹³⁰ However, as is often the case with the introduction of labour legislation, it was a combination of specific social, economic and technological factors, rather than a concern for social justice, that created the environment for its acceptance. During a time of relative high employment, the aim was to make change due to new technologies acceptable to workers, and to encourage mobility of labour.¹³¹ It was hoped that workers who lost their jobs as a result of the introduction of high technology in some of the more

¹²⁸See John Bowers and Andrew Clarke, "Unfair Dismissal and Managerial Prerogative: A Study of 'Other Substantial Reason'," 10 *Indus. L.J.* 34-44 (1981).

¹²⁹Paul Davies and Mark Freedland, *Labour Law: Text and Materials* 528 (2d ed. London 1984).

¹³⁰*Workforce Reductions in Undertakings* 3 (E. Yemin ed., Geneva 1982).

¹³¹Brian Napier, "Retention of the Job in the Event of Change in Structure of the Enterprise - Legal Aspects," 3 *Int'l J. Comp. Lab. L. & Indus. Rel.* 158, 159 (1987); R.H. Fryer, "The Myths of the Redundancy Payments Act," 2 *Indus. L.J.* 1 (1973).

traditional industries would be willing to move to sectors that were experiencing a labour shortage, and that employees over a broad spectrum would come to accept the concept of redundancy. A broad characterisation of severance pay in Britain, thus, suggests some recognition of a property right in a job with the idea that workers should be compensated for loss of their job security.¹³² In addition, there is an efficiency rationale aimed at promoting flexibility, and the Redundancy Payments Act 1965 was commonly seen as "part of an overall manpower policy aimed at securing a greater acceptance by workers of the need for economic and technological change."¹³³

Statutory redundancy payments¹³⁴ were introduced in Britain after studies had shown that employers and unions were reluctant to negotiate redundancy agreements¹³⁵ and that voluntary collective bargaining could not deal adequately with the problems of industrial restructuring.¹³⁶ The statutory scheme has not replaced voluntary agreements, however, and employers and unions are free to contract above the statutory minimum. Moreover, the parties to an agreement may apply for exemption from the statute if certain requirements are met,¹³⁷ but this has rarely happened in practice.¹³⁸

As an answer to the shortcomings of collective bargaining the statute was only partially successful. An assessment of statutory redundancy payments in Great Britain after twenty years, showed that they, in fact, made it easier for employers to achieve

¹³²R.H. Fryer, "The Myths of the Redundancy Payments Act," 2 *Indus. L.J.* 1, 8 (1973).

¹³³S.R. Parker, C.G. Thomas, N.D. Ellis and W.E.J. McCarthy, *Effects of the Redundancy Payments Act 3* (London 1971).

¹³⁴Redundancy payments are made by employers, who could originally claim a rebate of 70% from the State Redundancy Fund, but the rebate had been progressively reduced over the years, and was finally abolished in 1986 (Wages Act, 1986), except for companies employing fewer than ten employees. Redundancy rebates were completely abolished by the Employment Act 1989. This means that small employers whose right to a rebate was preserved by the Wages Act 1986 lost this entitlement from 16 January 1990. Firms can, however, set off redundancy pay as an expense against corporation tax.

¹³⁵Donovan Commission, *Report of the Royal Commission on Trade Unions and Employers Associations*, Cmnd. 3623 (1968).

¹³⁶Paul Lewis, *Twenty Years of Statutory Redundancy Payments in Great Britain* 4 (1985) (Leeds-Nottingham Occasional Papers in Industrial Relations).

¹³⁷The Secretary of State may exempt collective redundancy agreements under sec. 96, EP(C)A.

¹³⁸Paul Lewis, *Twenty Years of Statutory Redundancy Payments in Great Britain* 13 (1985) (Leeds-Nottingham Occasional Papers in Industrial Relations).

redundancies. On the one hand, reduced opposition from workers during major restructuring was noted, apparently because financial compensation removed the fear of insecurity.¹³⁹ On the other hand, it was found that employees were not adequately compensated for job loss, partly because as many as fifty per cent of redundant workers were not covered by the scheme, and partly because the compensation for those who received it was inadequate.¹⁴⁰ Only a minority of workers received negotiated payments in excess of the statutory amounts.¹⁴¹ With a very limited range of alternative jobs, it seemed as if most of the workers who had been made redundant joined the ranks of the retired or the unemployed.¹⁴²

The legislation provides¹⁴³ that employees over the age of eighteen with a minimum of two years' service who are made redundant are entitled to a lump sum payment which is calculated according to age, length of continuous service and weekly pay.¹⁴⁴ In order to qualify for compensation for the loss of a job, employees have to prove that they have been dismissed. A dismissal is taken to be for reason of redundancy if it results from an employer's decision to close a business or part of a business, or to move the business to another place, or to change the requirements of the business in a way that employees become superfluous.¹⁴⁵ Redundancy as defined in the Act concerns mainly two types of situation, one where a business is shut down, and the other where an enterprise continues to function but with a decline

¹³⁹*Id.* at 31.

¹⁴⁰*Id.* at 29.

¹⁴¹*Id.* at 30.

¹⁴²*Id.* at 31.

¹⁴³Redundancy Payments Act 1965 (now EP(C)A Part VI).

¹⁴⁴For details see Brian Napier, "Retention of Job in the Event of Change in Structure of the Enterprise - Legal Aspects," 3 *Int'l J. Comp. Lab. L. & Indus. Rel.* 158 (1987); S.D. Anderman, "Unfair Dismissals and Redundancy," in *Labour Law in Britain* 433 (R. Lewis ed., Oxford 1986).

¹⁴⁵A dismissal is taken to be for reason of redundancy under sec. 81(2)(EP(C)A Part VI) if it is attributable wholly or mainly to:

(a) the fact that [the] employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed, or (b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where they were so employed, have ceased or diminished or are expected to cease or diminish.

in demand for work of a particular kind.¹⁴⁶ The first type of situation has not been difficult to characterise, but Courts have had problems in deciding which circumstances qualify as a redundancy in the second group of cases. The Act, instead of including all dismissals "for one or more reasons not related to the individual workers concerned",¹⁴⁷ relied on a job-related definition of redundancy. As a result, when changes of a technical or social nature occur which make it impossible for employees to perform their jobs, they do not qualify as redundancy dismissals if the jobs still exist in principle. The failure of the statute to provide workers with extensive legal protection in the case of job loss for economic reasons, has been aggravated by the reluctance of judges to interpret provisions of the statute so as to give effect to their protective aim. The decisions on whether an employee qualifies for a payment have developed in a way that not only places no check on an employer's decision to make workers redundant, but also construes an employee's contract of employment to imply flexibility as to tasks,¹⁴⁸ place¹⁴⁹ and hours of work.¹⁵⁰ As a result, employees who have been affected by business reorganisations and have refused to go along with changes in terms and conditions, have been dismissed without being able to claim statutory redundancy payment.

Thus, when a pub was refurbished to reflect a youthful ambience a middle-aged barmaid had to make way for a more attractive younger girl. It was held, however, that there was no redundancy because the work had not really changed and the job vacancy remained.¹⁵¹ Another employee unable to claim statutory redundancy payment was a workshop manager who did not have the skills to operate new car-servicing equipment introduced when a new company took over the garage for which

¹⁴⁶The second part of the definition characterises as redundancy "the fact that the requirements of [the] business for employees to carry out work of a particular kind or for employees to carry out work of a particular kind in the place where [the employee was employed] have ceased or diminished or are expected to cease or diminish" (EP(C)A 1978, sec. 81(2)(b)).

¹⁴⁷Council Directive 75/129 of 17 February 1975, Art. 1.

¹⁴⁸*North Riding Garages v. Butterwick*, [1967] 2 Q.B. 56 (Div'l Ct.).

¹⁴⁹Geographical mobility is a matter on which a contractual term will normally be implied, although its content will vary. See *Jones v. Associated Tunnelling Co. Ltd.*, [1981] I.R.L.R. 477 (E.A.T.); but cf. *Murphy v. Epsom College*, [1985] I.R.L.R. 80 (C.A.).

¹⁵⁰*Johnson v. Nottinghamshire Combined Police Authority*, [1974] I.C.R. 170 (C.A.); *Lesney Products Ltd. v. Nolan*, [1977] I.C.R. 235 (C.A.).

¹⁵¹*Vaux and Associated Breweries v. Ward*, [1968] 112 Sol. J. 761 (Div'l Ct.); [1969] 113 Sol. J. 920 (Div'l Ct.).

he had worked for several years. The Court asserted that an employee had to have the ability to adapt to new methods and techniques, and could not complain if an employer introduced higher standards of efficiency.¹⁵² Through a series of cases the idea developed that there was no redundancy as long as a certain post remained, even if conditions changed to the extent that it became impossible for an employee to continue to function in that post. This happened, for example when, during a trade recession, an employer withdrew free transport to work for employees from a neighbouring village,¹⁵³ or when hours of work were changed from a five-day week to a shift system over six days.¹⁵⁴

The reason for denying employees redundancy pay in situations such as the above is not clear but probably has to do with the negative perception of redundancy in times of recession and economic decline.¹⁵⁵ The fewer recognised redundancies there are, the less serious the decline in productive activity may seem. In addition, Courts may be reluctant to discourage employers from hiring more labour when an increased demand is expected, even if the expectation turns out to be mistaken, and the employees then have to be dismissed.¹⁵⁶ In other words, fear of applying any undesirable curb to an employer's prerogative to hire and fire during the conduct of a business, may contribute towards the Courts' unwillingness to apply the definition of redundancy to a wide range of cases. Whatever the reason behind the trend to limit the concept of redundancy, the result has been clear: employees have been deprived of protection in circumstances where they have become unemployable because of technological changes or managerial changes regarding conditions of their employment. Little is left of the original aim which was to protect employees when they were dismissed without being at fault, and in many cases employees have had to bear the costs of managerial changes or inefficient policies.

In many cases, employees' entitlement to redundancy payment has been assessed purely from a managerial perspective. The tendency has been for the

¹⁵²*North Riding Garages v. Butterwick*, [1967] 2 Q.B. 56 (Div'l Ct.).

¹⁵³*Chapman v. Goonvean and Rostowrack China Clay Co. Ltd*, [1973] I.C.R. 310 (C.A.).

¹⁵⁴*Johnson v. Nottinghamshire Combined Police Authority*, [1974] I.C.R. 170 (C.A.).

¹⁵⁵Paul Davies and Mark Freedland, *Labour Law* 540 (2d ed. London 1984).

¹⁵⁶*O'Hare v. Rotaprint Ltd.*, [1980] I.C.R. 94 (E.A.T.). Although this case concerned a claim of unfair dismissal, the E.A.T. reluctantly suggested that it could probably have been a redundancy.

Courts to regard redundancy as a subjective concept and therefore to make a finding of redundancy only in instances where the employer admits to dismissals for reasons of redundancy. If the employer offers another reason for dismissal, including a claim that the employment was no longer profitable, the Courts will accept that reason as long as they are satisfied that the ground put forward by the employer is genuine and based upon some factual basis.¹⁵⁷ Therefore, indirectly, an employer has considerable influence with regard to the decision whether to grant an employee redundancy pay or not. An employer can also directly avoid liability for redundancy payment by making a suitable offer of alternative employment.¹⁵⁸ If an employee unreasonably refuses an offer of a job which is substantially equivalent,¹⁵⁹ the claim to redundancy payment will be lost.

With the narrowing of the concept of redundancy, in many instances the only possible remedy for the employee who is made redundant can be found in the unfair dismissal legislation. Fairness extends to issues such as selection for redundancy and the need for consultation with recognised trade unions. The National Industrial Relations Court interpreted the legislative provisions to apply to a general category of unfair selection for redundancy.¹⁶⁰ In almost contradictory fashion, however, the Courts proceeded to give broad recognition to managerial prerogative within this category and made it possible for the employer to avoid liability. The Courts generally accept management's discretion to decide upon selection criteria when there is a need for reduction of the workforce, as long as such criteria are not obviously unreasonable, and will only interfere to ensure that consultation takes place with recognised trade unions.¹⁶¹

A transfer often results in redundancy of employees of either the transferor¹⁶²

¹⁵⁷*Hindle v. Percival Boats Ltd.*, [1969] 1 All E.R. 836 (C.A.). See also Paul Davies and Mark Freedland, *Labour Law* 549-552 (2d ed. London 1984).

¹⁵⁸EP(C)A 1978, sec. 82(5).

¹⁵⁹*Hindes v. Supershine Ltd.*, [1979] I.R.L.R. 343 (E.A.T.).

¹⁶⁰An interpretation of EP(C)A 1978, sec. 59, operating with sec. 57 was given in *Bessenden Properties Ltd. v. Corness*, [1973] I.R.L.R. 365 (N.I.R.C.) (upheld by the Court of Appeal, [1974] I.R.L.R. 338 (C.A.)).

¹⁶¹*Williams v. Compair Maxam Ltd.*, [1982] I.R.L.R. 83 (E.A.T.).

¹⁶²Employees of the transferor may find that there is no further work available with their employer.

or the transferee.¹⁶³ However, the law prevents them from claiming redundancy payments from the transferor in three ways. First, the occurrence of a "relevant transfer" in terms of the Transfer Regulations will mean that there is no break in the contracts of employees and that the contracts continue with the transferee.¹⁶⁴ Second, if an employee is dismissed by the transferor and unreasonably refuses an offer of suitable alternative employment from the transferee, there will be no entitlement to redundancy pay.¹⁶⁵ Third, if the employees have a right to object to being transferred, and the transferor has no work available for them, they should be able to qualify for redundancy payments. Since the European Court judgement in *Katsikas v. Angelos Konstantinidis*¹⁶⁶ allowed this option, it seems compatible with EC law. But the TURER amendments make this impossible by providing that, where employees object, their contracts of employment with the transferor will be terminated, but they will not be treated as having been dismissed by the transferor.¹⁶⁷ The effect of these amendments is that employees lose any rights to claim unfair dismissal or redundancy pay, and thereby suffer a serious diminution of the right of objection. Basically they are only left with a right to terminate the contract.

Although a TUPE transfer will in some instances prevent recovery of a redundancy claim, all situations of transfer and redundancy share the general requirement of consultation. The redundancy consultation provisions¹⁶⁸ were essentially an implementation of the European Community's Directive on Collective Redundancies which formed part of the programme of legislation under the Social Contract. In the last section of this chapter these provisions will be considered together with the consultation provisions of the Transfer of Undertakings (Protection of Employment) Regulations, which also implemented an EC Directive.

¹⁶³Existing employees may be displaced by incoming employees who had previously been employed by the transferor.

¹⁶⁴TUPE 1981, Regulation 5(1).

¹⁶⁵EP(C)A 1978, sec. 94 specifies that the offer must have been made before the dismissal takes effect, and the offer must be of employment that is to start within four weeks of the end of his employment with the transferor.

¹⁶⁶*Katsikas v. Angelos Konstantinidis*, [1993] I.R.L.R. 179 (E.C.J.).

¹⁶⁷TURER Act 1993 sec. 32(4)(c).

¹⁶⁸Secs. 99-107 of the EPA 1975.

Insolvency

In the event of an employer's insolvency, employees who are faced with the usually inevitable loss of their jobs have two possible sources from which to claim for pecuniary losses: first, outstanding claims of employees for remuneration rank as preferential debts of the insolvent company (with other preferential creditors such as the Inland Revenue and the Department of Health and Social Security)¹⁶⁹ and second, most claims for remuneration and compensation for an employer's breach of statutory rights, with the exception of the compensatory award for unfair dismissal, are guaranteed by the state through the Redundancy Fund.¹⁷⁰ Once payment has been made out of the Redundancy Fund, the Secretary of State becomes subrogated to the employee's rights as a preferential creditor.

The shortcomings of the priority mechanism were revealed during investigations of the EEC Commission, particularly the insufficiency of the assets of an insolvent company to meet even priority claims, the long period before payment is made, and the intricacies of the proceedings which can make it difficult for employees to defend their interests without legal assistance. Mainly the Commission was concerned with the disadvantaged position of employees vis-a-vis other creditors in the event of their employer becoming bankrupt or otherwise insolvent. The investigations, which led to a proposal for a Directive,¹⁷¹ concluded that an employee's livelihood is not adequately safeguarded where the employee has to depend solely on enforcing claims in bankruptcy proceedings.¹⁷² In the UK many of the shortcomings of the priority system are alleviated by the additional availability of a state guaranteed system, such as the Redundancy Fund, to ensure payment of an employee's claims while the state

¹⁶⁹Sec. 319 of the Companies Act 1948. The combined effect of sec. 319 of the 1948 Act and sec. 121 of EP(C)A 1978 is that priority is given over a debt secured by a floating charge to: four months' arrears of wages (subject to a certain maximum), all accrued holiday pay, a guarantee payment, remuneration on suspension on medical grounds, payment for time off and remuneration under a protective award. Priority does not extend beyond statutory claims in the nature of wages to, for example, compensation for unfair dismissal or redundancy payments.

¹⁷⁰This system was introduced for redundancy payments by the Redundancy Payments Act 1965 (now EP(C)A 1978, secs. 106(1)(b) & (5)(c)) and extended to include two months' arrears of pay (subject to a certain maximum), pay for the statutory minimum period of notice, holiday pay (up to a certain maximum), basic award of unfair dismissal compensation, and the reimbursement of the premium paid by an articulated clerk (EP(C)A 1978, sec. 122).

¹⁷¹O.J. Eur. Comm. (No. C 135)(9 June 1978).

¹⁷²For the Report of the EEC Commission, see "Protection of employees in the event of the insolvency of their employer," 4 Bull. Eur. Comm. 46 (1978) and 10 Bull. Eur. Comm. 17 (1980).

bears the risk of delay and insufficiency of assets. If the UK Government's emphasis on the guarantee function of the state in the event of insolvencies appears strangely paternalistic and contradictory, given its usual preference for deregulation and free markets, it has to be noted that there is another side to this intervention by the state. The apparent, although not exclusive, aim is to facilitate the sale of assets of insolvent companies and to leave the liquidator, administrator or receiver with relative freedom to dispose of the assets in the most advantageous manner.¹⁷³

With proper attention given to the two important hinges on which the system of insolvency regulation in the UK turns, it can be considered to work effectively: employees are protected from suffering undue hardship and insolvent businesses can be sold more easily to ensure that the productive process continues. However, one obvious problem has disrupted the continuous smooth flow of the system. This problem stems from the incorporation of transfer provisions whose working in insolvency situations is anything but clear. The two European Directives which deal with insolvencies and transfers, respectively, do not adequately address this problem and guidance by the European Court of Justice leaves many questions unanswered.

Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer¹⁷⁴ deals mainly with guarantee institutions to guarantee employees' outstanding payments. Weaknesses of this Directive are that it does not consider the question of joint liability of the transferor and transferee in the event of the transferor's insolvency, and makes no provision for information and consultation rights.¹⁷⁵ When the Transfers Directive is applied to insolvency situations an additional problem arises. The scope of its application is not sufficiently clear and even after the European Court of Justice has had the opportunity to confront this issue, it is still uncertain which type of insolvency situations are covered by the Directive.

In *Abels*,¹⁷⁶ the issue arose whether a pre-liquidation procedure which gives

¹⁷³Hugh Collins, "Transfer of Undertakings and Insolvency," 18 Indus. L.J. 144, 157 (1989).

¹⁷⁴20 October 1980 (O.J. Eur. Comm. (No. L 283) (1980)).

¹⁷⁵Bob Hepple and Angela Byre, *The Application of EEC Labour Law in the United Kingdom* 15 (September 1988) (Study commissioned by the Directorate General for Employment, Social Affairs and Education of the Commission of the European Communities).

¹⁷⁶*Abels v. Bestuur van de Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie*, [1985] E.C.R. 469 (E.C.J.) (followed in *Industriebond FNV v. The Netherlands*, [1985] E.C.R. 511 (continued...))

temporary shelter from creditors, the Dutch *surseance van betaling*, fell within the scope of the Directive. The Court held that the Directive does apply to a procedure such as this judicial leave to suspend payment of debts, mainly because the object of such proceedings is to safeguard the assets of the insolvent undertaking and, where possible, to continue the business of the undertaking by means of a collective suspension of the payment of debts with a view to reaching a settlement that will ensure that the undertaking is able to continue operating in the future.¹⁷⁷ Consequently, the Directive does not apply to the transfer of an undertaking where the transferor has been adjudged insolvent and the purpose of the ensuing insolvency proceedings is the liquidation of the undertaking. This appears to be the principle which was also enunciated by the Court in *D'Urso v. Ercoli Marelli Elettromeccanica Generale SpA*.¹⁷⁸

The Court's conclusion means that only transfers which take place in the context of insolvency proceedings instituted with a view to continued trading, are covered. In *Abels* the Court gave some justification for treating insolvency which results in liquidation as an exception to the Directive, and in doing so mentioned that "insolvency law is characterized by special procedures intended to weigh up the various interests involved, in particular those of the various classes of creditors."¹⁷⁹ It then singled out the class of employees, for whose protection the Transfers Directive was designed, and asked itself whether applying the Directive to insolvent transferors whose assets were being liquidated would further employees' interests. Empirical evidence was hard to come by and the Court accepted that "considerable uncertainty exists regarding the impact on the labour market of transfers of undertakings in the case of an employer's insolvency."¹⁸⁰ On the one hand, the Danish Government had argued that "employees whose employer has been adjudged insolvent are precisely

¹⁷⁶(...continued)
(E.C.J.); *Arie Botzen v. Rotterdamsche Droogdok Maatschappij BV*, [1985] E.C.R. 519 (E.C.J.), and *Foreningen af Arbejdsledere i Danmark v. A/S Danmols Inventar*, [1985] E.C.R. 2639 (E.C.J.).

¹⁷⁷*Abels v. Bestuur van de Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie*, [1985] E.C.R. 469, 486 (E.C.J.).

¹⁷⁸[1992] I.R.L.R. 136 (E.C.J.).

¹⁷⁹*Abels v. Bestuur van de Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie*, [1985] E.C.R. 469, 483 (E.C.J.).

¹⁸⁰*Id.* at 485.

those who are in most need of protection."¹⁸¹ On the other hand, an argument can be made that the automatic transfer of all the employees' entitlements to the solvent transferee will affect the price which the transferee is willing to pay for the business. A lower price will mean a smaller pool of assets from which the creditors of the insolvent company can claim, and in general this will imply that employees are given a higher priority than all other classes of creditor.¹⁸² Even worse, a transferee faced with the transfer of the acquired rights of employees may be dissuaded from acquiring the undertaking "on conditions acceptable to the creditors thereof, who, in such a case, would prefer to sell the assets of the undertaking separately."¹⁸³ The Court was concerned that this would be prejudicial to the interests of employees and concluded that "a serious risk of general deterioration in working and living conditions, contrary to the social objectives of the Treaty, cannot be ruled out."¹⁸⁴

As commentators have shown, this decision does not satisfactorily address some of the fundamental problems which occur during the transfer of the business of an insolvent transferor, and even creates additional problems.¹⁸⁵ The insubstantiality of the evidence, which the Court itself noted, renders the conclusion very unconvincing. There is no evidence that the transfer of acquired rights in the context of insolvency is prejudicial to employee interests and that the Danish Government is not in fact correct that employees of an insolvent transferor are most in need of protection. Moreover, it is by no means clear, as Professor Hepple pointed out, that application of the Transfers Directive will lead the transferee to pay a price which is lower than the break-up value of the assets.¹⁸⁶ This implies that if the sale goes ahead, it will

¹⁸¹*Id.* at 484.

¹⁸²See P.L. Davies, "Acquired Rights, Creditors' Rights, Freedom of Contract, and Industrial Democracy", 9 Y.B. Eur. L. 21, 23 (1989); Bob Hepple, *Main Shortcomings and Proposals for Revision of Council Directive 77/187/EEC* 34-35 (December 1990)(Report for the Commission of the European Communities, unpublished).

¹⁸³*Abels v. Bestuur van de Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie*, [1985] E.C.R. 469, 485 (E.C.J.).

¹⁸⁴*Id.* at 485.

¹⁸⁵See P.L. Davies, "Acquired Rights, Creditors' Rights, Freedom of Contract, and Industrial Democracy", 9 Y.B. Eur. L. 21 (1989); Bob Hepple, *Main Shortcomings and Proposals for Revision of Council Directive 77/187/EEC* 34-40 (December 1990)(Report for the Commission of the European Communities, unpublished).

¹⁸⁶Bob Hepple, *Main Shortcomings and Proposals for Revision of Council Directive 77/187/EEC* 37 (December 1990)(Report for the Commission of the European Communities, unpublished).

benefit the employees who are transferred, and serve the monetary interests of the other creditors who will receive more than they would have received for the sale of the assets alone.

Second, the grounds propounded by the Court for distinguishing between procedures with a view to continued trading and liquidation procedures are insubstantial, since the choices involved in both processes show a great degree of similarity. The choice between the sale of a business as a going concern and a forced sale on a break-up basis occurs not only when a company is placed under liquidation, but is a choice which has to be made by all controllers of an insolvent company.¹⁸⁷ What is even more important is that both situations run into the same basic problem, which involves the priority given to employees' acquired rights in relation to the rights of other creditors.¹⁸⁸ Therefore, applying the Directive to pre-liquidation procedures such as a temporary suspension of debts, but not to liquidation procedures, is ultimately irrational and ineffective. When applied to specific legal insolvency proceedings in Britain -- and keeping in mind that such proceedings have to be construed so as to bring them into line with the demands of Community law -- the distinction will continue to involve an measure of speculation.

In the UK the legal insolvency of a company can include liquidation, administrative receiverships or administration under order of Court. A transfer of a company in liquidation which is being wound up by a Court would almost undoubtedly be excluded from the application of the Transfers Directive according to the distinction made in the *Abels* and *D'Urso* decisions. Not so in the case of transfers by an administrator,¹⁸⁹ who can be appointed for purposes very similar to those which the Dutch suspension of payments procedure strives to achieve, including the purpose of bringing about "the survival of the company, and the whole or any part of its undertaking, as a going concern", or of attaining "a more advantageous realization of the company's assets than would be effected on a winding-up." But the most contentious and problematic issue regarding the UK insolvency regulations is whether the Directive should be applied to administrative receivers, appointed by the holders of floating charges.

¹⁸⁷P.L. Davies, "Acquired Rights, Creditors' Rights, Freedom of Contract, and Industrial Democracy", 9 Y.B. Eur. L. 21, 47 (1989).

¹⁸⁸*Id.* at 23-25.

¹⁸⁹Administrators are appointed under Part II of the Insolvency Act 1986.

One of the significant tasks of an administrative receiver is to engage in the process of hiving down which involves selling off viable parts of the business as a going concern.¹⁹⁰ Before the transfer to a purchaser takes place, the receiver will first transfer those parts of the business which are regarded as salvageable to a subsidiary, incorporated specifically for the purpose of hiving down and usually renamed after the original company. The advantage of this method is usually described in terms of a "neat commercial package" which gives potential purchasers an easier opportunity to assess the value of their purchase, which has been separated from the company in receivership. When the Transfer Regulations were introduced in the UK, the process of hiving down caused great controversy because of the practice that employees were not offered employment by the subsidiary but remained in the employment of the parent company. If the purchaser decided not to make offers of re-employment, the employees would be dismissed by the insolvent company, which meant that this company would incur liability for employees' claims in respect of the dismissal. The most desirable consequence of this arrangement for the purchaser and the creditors of the insolvent company was that there were no hidden costs involved: employees had no claims against either the solvent subsidiary or the purchasing company. Claims for redundancy payments and protective awards would ultimately be covered by the Redundancy Fund, but compensation for unfair dismissal would rank as an unsecured claim against the insolvent company.

In spite of arguments that the process of hiving down defeated the legitimate claims of employees, the Government decided to continue the practice unamended and to protect it from the automatic transfer provisions. This is done by providing that no transfer of employment from the insolvent company to the subsidiary takes place until immediately before the purchaser takes over the subsidiary.¹⁹¹ Before the transfer occurs, a purchaser will be able to request the dismissal of unwanted employees. Only the employees whom the purchaser wishes to retain would, through two applications of the transfer rule in short succession, become employees of the subsidiary, and subsequently employees of the purchaser.

Several arguments have been advanced to show that transfers by administra-

¹⁹⁰For a more detailed discussion of the process, see P.L. Davies and M. Freedland, "The Effects of Receiverships upon Employees of Companies," 9 Indus. L.J. 95, 104-111 (1980); P.L. Davies, "Acquired Rights, Creditors' Rights, Freedom of Contract, and Industrial Democracy," 9 Y.B. Eur. L. 21, 32-34 (1989).

¹⁹¹TUPE 1981, Regulation 4.

tive receivers fall within the scope of the Directive and that, by excluding this practice, the UK is not complying with its obligations. The essence of these arguments is that the main task of the receiver is to sell off viable parts of the business as a going concern for the purpose of realizing the debenture holder's security.¹⁹² These arguments are usurped by the even stronger argument that TUPE reg.4 which creates an exception in hiving-down situations has become defunct since *Litster*,¹⁹³ which developed the requirement of purposive interpretation. Even without formally abolishing the exception by legislation, purposive interpretation imposes the duty to construe provisions in compliance with Community law,¹⁹⁴ and can therefore achieve the same result. In the light of the purposive interpretation which was developed in *Litster*,¹⁹⁵ the exception which the UK Government created for hiving down proceedings does not appear to have any force.¹⁹⁶ The main task of the receiver is to sell off viable parts of the business as a going concern for the purpose of realising the debenture holder's security.¹⁹⁷ If the receiver fulfills this task with regard to an insolvent undertaking and with the purpose of ensuring continued trading, the Directive could apply to the proceedings.¹⁹⁸

Although arguments like these are important in terms of the distinction which the European Court has made between different kinds of insolvency proceedings, the fundamental problem remains, which is that of formulating clear policy regarding the priority of employees' claims in relation to those of other creditors. That problem appears to fall more easily within the province of the European Directive which deals

¹⁹²P.L. Davies, "Acquired Rights, Creditors' Rights, Freedom of Contract, and Industrial Democracy," 9 Y.B. Eur. L. 21, 48 (1989).

¹⁹³*Litster v. Forth Estuary Engineering Ltd.*, [1989] I.R.L.R. 161 (H.L.).

¹⁹⁴*Marleasing SA v. La Comercial Internacional de Alimentacion SA*, [1992] 1 C.M.L.R. 305 (E.C.J.).

¹⁹⁵*Litster v. Forth Estuary Engineering Ltd.*, [1989] I.R.L.R. 161 (H.L.).

¹⁹⁶That is if the qualification introduced in *Webb v. EMO Air Cargo (UK) Ltd.*, [1993] I.R.L.R. 27 (H.L.) will not upset purposive interpretation. According to the House of Lords in *Webb*, such interpretation cannot be used to defeat the clear wording of a UK statute.

¹⁹⁷P.L. Davies, "Acquired Rights, Creditors' Rights, Freedom of Contract, and Industrial Democracy," 9 Y.B. Eur. L. 21, 48 (1989).

¹⁹⁸A potential problem with this argument is, however, created by the decision in *Webb v. EMO (Air Cargo) UK Ltd.*, [1993] I.R.L.R. 27 (H.L.) from which it appears that purposive interpretation cannot be used in the case of direct conflict between a UK statute and the Directive.

with the protection of employees in the event of the insolvency of their employer,¹⁹⁹ than under the Transfers Directive. Reluctantly, and faced with scant evidence, the European Court made an unconvincing choice to interfere with the priority mechanism in some instances of the transfer of insolvent businesses. This step was necessitated by the lack of adequate financial protection of employees' outstanding claims by guarantee institutions. The availability of a state guaranteed system to ensure payment of employees' claims is an issue which, like the priority mechanism, deserves to be addressed by the Insolvency Directive in a more adequate way than it does at present. At the moment the combined application of the Insolvency Directive and the Transfers Directive in insolvency situations does not provide cogent relief to the inevitable turmoil which is created by business insolvencies, in the interest of either employees or the productive process .

Obligations to negotiate or consult

1. Collective bargaining theory

In the United Kingdom, unlike the United States, there is no general legal duty upon an employer to bargain with the organization which is representative of its workforce and no statutory procedure exists for the recognition of a trade union for collective bargaining purposes. The relative lack of statutory support for collective bargaining can be explained in terms of the present Government's concern for burdens on employers which may impede the beneficial operation of the voluntary labour market, a stance which becomes more significant when considered in the context of the historical development of the collective bargaining process in Britain. The extensive system of collective bargaining which existed by the 1950s, at least for manual workers, operated largely unabettled by laws. The explanation for the absence of legal mechanisms to require employers to bargain with trade unions was given in terms of the theory of collective laissez-faire, which implied a limited role for the law in the field of industrial relations. The theory was based on the assumption that the nature of the relations between employers and employees should be determined through "the regulatory function of collective forces in society", rather than by the

¹⁹⁹Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of Member States relating to the protection of employees in the event of the insolvency of their employer (O.J. Eur. Comm. (No. L 283) (1980)).

state.²⁰⁰ The function of the law was seen primarily in terms of the promotion of voluntarism.²⁰¹ In practice this meant that employers were not obliged by law to deal with unions and collective agreements were not directly enforceable as contracts. The general character of state policy was non-interventionist, even to the extent that legislation for the protection of individual employees was largely absent.

Legal changes which started during the 1960s when collective laissez-faire ceased to be the dominant ideology,²⁰² were the result of an economic and social crisis, characterised by industrial conflict and low productivity. Britain's poor economic performance in comparison to other industrialised countries and relatively slow economic growth were linked to collective bargaining practices. The feasibility of legal reforms of existing practices of collective bargaining was extensively debated in the Report of the Donovan Commission²⁰³ and successive Governments introduced a series of laws to regulate industrial relations.²⁰⁴ The approach during this period reflected a consensus that a system of free collective bargaining was the most socially adequate way to regulate and determine conditions of employment. Collective bargaining was, the Donovan Commission found, "the most effective means of giving workers the right to representation in decisions affecting their working lives, a right which is or should be the prerogative of every worker in a democratic society".²⁰⁵

With the election of the Conservative Government in 1979, social policy for the promotion of collective bargaining was reversed and statutory measures to facilitate its extension were withdrawn. However, deregulation as far as support for collective

²⁰⁰See O. Kahn-Freund, "Labour Law" in *Selected Writings of Otto Kahn-Freund* 8 (London 1978).

²⁰¹On the historical development, see *Kahn-Freund's Labour and the Law* (P. Davies and M. Freedland eds., 3d ed. London 1983); Lord Wedderburn, "Industrial Relations and the Courts," 9 *Indus. L.J.* 65 (1980) and "The New Policies in Industrial Relations Law," in *Industrial Relations and the Law in the 1980's: Issues and Future Trends* 22-65 (P. Fosh and C. Littler eds., Aldershot 1985); R. Lewis, "The Historical Development of Labour Law," 14 *Brit. J. Indus. Rel.* 1-17 (1976).

²⁰²A trend towards legal regulation became evident with the development of statutory employment protection through the Contracts of Employment Act 1963, the Redundancy Payments Act 1965, the Equal Pay Act 1970 and the Industrial Relations Act's 1971 provisions on unfair dismissal.

²⁰³Donovan Commission, *Report of the Royal Commission on Trade Unions and Employers Associations*, Cmnd. 3623 (1968).

²⁰⁴The Industrial Relations Act 1971, introduced by the Conservative Government of Edward Heath, was repealed by the Labour Government elected in 1974 (Trade Union and Labour Relations Act 1974, sec. 1(1)). Various Acts followed after that, including the Employment Protection Act 1975; the Employment Protection (Consolidation) Act 1978; the Employment Acts 1980 and 1982.

²⁰⁵Donovan Commission, *Report of the Royal Commission on Trade Unions and Employers Associations*, para. 212, Cmnd. 3623 (1968).

bargaining was concerned did not imply a return to a policy of collective laissez-faire. The law continued to regulate aspects of industrial relations such as industrial action, trade union government and the rights of individual employees. The reason why the trend towards legal regulation was checked in the case of collective bargaining was that it was seen to distort market relations between employer and individual employees, thereby causing economic inefficiency. The Government sought to restore "free" markets through deregulation, privatisation, reduction of public expenditure and the weakening of trade union power. The emphasis on market forces left little room for consideration of the underlying social purpose of collective bargaining, namely participation by unions as a "means of enabling workers to gain more control over their working lives".²⁰⁶ Government policy led to the repeal of the statutory procedure which unions could invoke to secure recognition for bargaining purposes,²⁰⁷ thus removing the foundation of the statutory structure for the encouragement of collective bargaining. Recognition as the crucial step in the development of the bargaining relationship and the securing of trade union rights became a voluntary process. By withholding recognition, it became possible for employers to avoid statutory duties including disclosure of information for collective bargaining purposes²⁰⁸, consultation over redundancies²⁰⁹ or over proposed transfers of a business²¹⁰.

2. Application of collective bargaining theory in general

Collective bargaining

Despite the fact that the law does not trigger the bargaining process or regulate methods of bargaining, widespread collective bargaining remains a distinctive feature of British industrial relations. The pay and other terms of employment of over two-thirds of employees are determined by collective bargaining.²¹¹ However, collective

²⁰⁶Allan Flanders, *Management and Unions* 42 (London 1970).

²⁰⁷EA 1980.

²⁰⁸EPA 1975, sec. 17(2).

²⁰⁹EPA 1975, sec. 99(1).

²¹⁰TUPE 1981, Regulations 10 and 11.

²¹¹B.A. Hepple, "The Harmonisation of Labour Law in the EEC: A British Perspective," 6 *Recht der Arbeit* 348, 349 (1989).

bargaining as a model of employee participation in Britain has not extended into the sphere of what is generally seen as management decisions. The reasons for this not only concern Government policy, but also the structure of British labour relations in which the current policy is rooted. Collective bargaining has touched only on marginal issues while the "major structural features which are crucial for the power, status, and rewards of the owners and controllers" have remained unaffected.²¹² Fox's comments regarding the structural constraints limiting the collective bargaining process in Britain are particularly apposite:

"Power and social conditioning cause the employee interests to accept management's shaping of the main structure long before they reach the negotiating table. Thus the discussion may be about...how the participant interests can protect and advance themselves within the structure operated by management to pursue its basic objectives, but not about the nature of those basic objectives."²¹³

In the pluralist tradition it is accepted that a trade union which succeeds in gaining voluntary recognition for collective bargaining purposes, will come up against the limits of the legal definition of collective bargaining. In terms of the Act, negotiations must be related wholly or mainly to matters such as terms and conditions of employment, or machinery for the settlement of disputes.²¹⁴ Negotiations over issues such as investment policy or the location of a new plant do not seem to be included in the subject matter of bargaining as legally defined. As a result of the restrictive attitude towards negotiation, the scope and detail of collective agreements tend to be very limited, with the emphasis on procedures rather than on substance.²¹⁵ There are few limits on the rule-making power of the employer, a fact which is sometimes expressly recognised in a "managerial prerogative" clause in an agreement. Employee participation is further reduced by the lack of legal machinery in the UK for the enforceability and extension of collective agreements which have no contractual effect unless the parties agree otherwise in writing. Such intent has been expressed in very few agreements with the result that the vast majority of agreements are not legally binding between the collective parties. Agreements may have normative effect, however, through incorporation in the individual contract. Although

²¹²A. Fox, "Industrial Relations: A Social Critique of Pluralist Ideology," in *Man and Organization* 211 (J. Child ed., London 1973).

²¹³*Id.* at 219.

²¹⁴EPA 1975, sec. 126(1) and TULRA 1974, sec. 29(1), as amended by EA 1982 sec. 18.

²¹⁵B.A. Hepple, "The Harmonisation of Labour Law in the EEC: A British Perspective," 6 *Recht der Arbeit* 348, 349 (1989).

this provides some safeguards for the individual employee, it is possible for an employer to change terms of employment by terminating the individual contract with notice and to offer re-employment on new terms.²¹⁶ In such an event, an employee is not likely to succeed with a complaint of unfair dismissal, provided that consultation took place and the terms are such as could be required by a reasonable employer.²¹⁷

Consultation

While UK labour law has few legal mechanisms left for the encouragement of the processes of collective bargaining, legal obligations to consult have become a significant feature of collective labour law. Such obligations have mainly been introduced as a result of the United Kingdom's membership of the European Community (EC). Three broad principles formed the basis of the 1974-76 Social Action Programme of the EC, namely full and better employment; the improvement of living and working conditions; and greater participation of workers and employers in the economic and social decisions of the Community. It was the latter principle which led to proposals by the Commission for Directives on collective dismissals and the protection of the rights of workers in takeover and merger situations.²¹⁸ The fact that the EC Directives on collective redundancies and transfer of undertakings were introduced under the heading of "participation and industrial democracy" gives some indication of the policy objectives underlying these instruments²¹⁹ which clearly recognised the importance of giving workers a voice within the work environment by allowing them to influence decisions to terminate their employment or to transfer control. Worker participation and industrial democracy have not been uncontroversial, however, and it is significant that the Directives do not address the problems arising from the legal status of the company and the exclusion of workers from corporate

²¹⁶*Burdett Coutts v. Hertfordshire CC*, [1984] I.R.L.R. 91 (Q.B.).

²¹⁷B.A. Hepple, "The Harmonisation of Labour Law in the EEC: A British Perspective," 6 *Recht der Arbeit* 348, 350 (1989).

²¹⁸Bob Hepple and Angela Byre, *The Application of EEC Labour Law in the United Kingdom* 15 (September 1988) (Study commissioned by the Directorate General for Employment, Social Affairs and Education of the Commission of the European Communities).

²¹⁹*Id.* at 14-15.

government,²²⁰ and that no further progress has been made with worker participation measures. The proposed Fifth Directive on worker involvement in company structure has never been adopted.²²¹ Similarly, the proposed Directive on employee information and consultation procedures in large national and multinational firms, generally known as the Vredeling Richards Directive, has not been enacted.²²²

To the extent that the European Community has extended the obligations on employers to consult trade unions and preserved collective and individual rights, it has had a moderating influence on the legislative policies of the present Government in Britain. However, the reality of industrial relations practice has not been altered significantly and dominant social values in member states still prevail. Community social policies have not intervened too directly in the power relations between capital and labour. The Directives which were passed did not encounter much opposition from employers, mainly because the Commission was prepared to remove some clauses in its original proposals which the employers found objectionable.²²³ From the participatory measure which was envisaged under the first draft Directive to the procedure which was finally adopted by the European Community, a weakening took place. The first draft provided for negotiations with a view to reaching agreement, and if no agreement could be reached, the issue could be referred by either party to binding arbitration to decide on steps for the protection of employees.²²⁴ The final provision refers only to a duty to consult, not negotiate, with a view to seeking agreement, and makes no reference to binding arbitration.²²⁵ By abolishing the idea of binding arbitration for failure to reach an agreement, the Commission destroyed the

²²⁰The British Government has constantly resisted attempts by the EEC to finalise draft Directives on company law (O.J. Eur. Comm. (No. C 240) 2 (9 September 1983)) and on procedures for information and consultation in companies with complex structures (the "Vredeling Richards" Directive)(O.J. Eur. Comm. (No. C 217) 3 (12 August 1983)).

²²¹The proposed Fifth Directive was first presented to the Council in 1972 and again in a revised form in 1983 but so far no decision has been taken.

²²²The proposals for the Directive were presented to the Council on 24 October 1980 and thereafter amended and revised on various occasions.

²²³Chris Brewster and Paul Teague, *European Community Social Policy* 92 (London 1989).

²²⁴(COM No. 74) 351 final, art. 8. This procedure was probably modelled on the German *Sozialplan* as provided for in article 112 of the *Betriebsverfassungsgesetz* of 1972.

²²⁵Directive 77/187, Art. 6.

incentive for employers to act in a socially responsible way.²²⁶ The lack of any mechanism for demanding some form of social responsibility in relation to transfer decisions or redundancies is confounded by the general lack of democratic structures in the context of employment.

Disclosure

The statutory duty which British law imposes on an employer to disclose information to an independent recognised trade union has not been affected by the repeal of legislative support for collective bargaining.²²⁷ An employer is obliged to disclose information without which the trade union would be to a material extent impeded in carrying on collective bargaining, and which it would be in accordance with good industrial relations practice to disclose for the purposes of collective bargaining. The fact that the duty of disclosure has been retained while the trend continued for the reduction of other supports for collective bargaining may lead one to believe that there is general acceptance of the provisions. However, the terms in which the duty is formulated has led to a narrow application and the law's direct influence has been insignificant.

The obligation to disclose information is limited by the extent of the employer's recognition of the union for the purposes of collective bargaining. A union is only entitled to information regarding matters "in respect of which the union is recognised for collective bargaining".²²⁸ Limiting disclosure to recognised bargaining subjects means that information will mostly concern details of terms and conditions of employees. Unions have been relatively successful in obtaining information regarding wages and employment practices, suggesting that an implicit presumption of relevance operates in this area.²²⁹ The legal limits of collective bargaining excludes information about strategic subjects such as investment plans, marketing policy, plant

²²⁶The same shortcoming has been noticed with regard to redundancy legislation. Employers in the UK are required only to notify, not to obtain the consent of public authorities before making large scale redundancies. P.L. Davies and M. Freedland, *Labour Law: Text and Materials* 249 (2d ed. London 1984).

²²⁷The obligation was introduced by the IRA 1971, sec. 56 and incorporated in EPA 1975, sec. 17(1)(b).

²²⁸*R. v. Central Arbitration Committee ex parte BTP Tioxide Ltd.*, [1982] I.R.L.R. 60 (Q.B.).

²²⁹Janice R. Bellace and Howard F. Gospel, "Disclosure of Information to Trade Unions: A Comparative Perspective," 122 Int'l Lab. Rev. 57, 65 (1983).

location and closures.²³⁰

Once a trade union has established that its request for information is within the limits of its recognized bargaining powers, two statutory tests may operate to exclude disclosure of potentially relevant information. First, the information must be information without which the trade union representatives would be to a material extent impeded in carrying on collective bargaining. This test weighs requested information in terms of its importance²³¹ and necessity²³² for the collective bargaining process and suggests that information must be indispensable for bargaining, a difficult hurdle for the union to overcome in argument. The second test concerns "good industrial relations practice", a vague concept which adds little to a determination of information which may be considered relevant.

In addition to the two tests regulating disclosure, an employer may be exempted from the duty in a variety of circumstances. Employers are exempted from disclosing original documents²³³ and from compiling information which involves disproportionate work or expenditure.²³⁴ In addition, certain types of information are excluded from the duty to disclose, including confidential information and information that would cause substantial injury to an employer's undertaking if disclosed.²³⁵

The goal of fuller disclosure of information, as expressly stated in the British legislation, is to promote "good industrial relations".²³⁶ This concept is ill-defined and the law does not provide the necessary supports to achieve the proposed goal. The duty to disclose arises only when there is collective bargaining, a process for which there is no legal underpinning. The shaky legal foundation is not strengthened by the traditional adversarial model of industrial relations which has been characterised by employers' assertion of their managerial prerogative. Employers have been loath to disclose information which may lead to greater union bargaining power and which may interfere with managerial decision-making.

²³⁰Howard F. Gospel, "Disclosure of Information to Trade Unions," 5 *Indus. L.J.* 223, 226 (1976).

²³¹*Daily Telegraph Ltd. and Institute of Journalists*, CAC Award No. 78/353, para. 20.

²³²*Civil Service Union v. Central Arbitration Committee*, [1980] *I.R.L.R.* 274 (Q.B.).

²³³EPA 1975, sec. 18(2)(a).

²³⁴EPA 1975, sec. 18(2)(b).

²³⁵EPA 1975, sec. 18(1).

²³⁶EPA 1975, sec. 17(1)(b).

3. Application of theory - business transfers and redundancies

Consultation

The Directive on Collective Redundancies, issued by the Council of Ministers of the European Communities in 1975,²³⁷ required member states to introduce provisions for consultation with workers' representatives. Following this Directive, the Transfers Directive presented more duties to inform and consult in the event of a relevant transfer.²³⁸ Initially, the consultation duties under the two Directives overlapped but differed at the same time, thereby creating potential problems for employers who had to comply with both sets of obligations. The major differences in the wording and requirements of the Transfers Directive and the Directive on Collective Redundancies have, however, been removed by a Directive amending the Directive on Collective Redundancies.²³⁹ After these amendments, a situation which may arise when a transferor or transferee contemplates collective redundancies either before or after the transfer has been rendered much less complicated. If such redundancies are for valid "economic, technical or organisational reasons"²⁴⁰ the protection for individual employees falls away but the rights of their representatives to information and consultation remain. The requirements of the Transfers Directive and the Directive on Collective Redundancies concerning the content of information, the aim and content of consultation, and the timing for information and consultation are now substantially similar. For example, both the Transfers Directive and the Directive on Collective Redundancies require that the transferor inform in good time. If measures are envisaged in relation to employees, an employer is required to consult in good time. The similarity in the consultation requirements of the two Directives underlines the importance of industrial democracy generally, and particularly when managerial decisions have serious consequences for employees. However, a more complete and unequivocal statement of industrial democracy in a separate Directive would have been a more bold step forward. One of the most constructive suggestions to avoid the problems of overlap between the two Directives, in the event that collective redundancies are contemplated by either a transferor or transferee, was made by

²³⁷Council Directive 75/129 of 17 February 1975.

²³⁸Directive 77/187 of 14 February 1977, Art. 6.

²³⁹Council Directive 92/56/EEC of 24 June 1992 amending Directive 75/129/EEC (O.J. Eur. Comm. (No. L 245) 3 (1992)).

²⁴⁰Art. 4 of the Transfers Directive.

Professor Hepple in his Report for the Commission of the European Communities on the main shortcomings and proposals for revision of the Transfers Directive.²⁴¹ He recommended that the general duties to inform and consult employee representatives in the event of restructuring of undertakings should be set out in a separate Directive. In a sweeping proposal which, if implemented, would approach a more complete framework for industrial democracy, Professor Hepple suggested that "restructuring" should include transfers and concentrations of undertakings, technological changes, and that the duty to consult should arise in respect of any management proposal likely to have serious consequences for the interests of the employees of the undertaking.²⁴²

A requirement that employers consult with recognised trade unions was first enacted in the UK in 1975, essentially as an implementation of the EC's Directive on Collective Redundancies.²⁴³ The law provides that an employer who proposes to make an employee redundant has an obligation to inform and consult with a recognised trade union about the decision. The definition of redundancy for the purposes of the statutory consultation provisions has recently been amended -- in conformity with the European approach -- to include any dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related.²⁴⁴ It is further provided that, for consultation purposes, where an employee is or is proposed to be dismissed it shall be presumed, unless the contrary is proved by the employer, that the dismissal is for redundancy.²⁴⁵ Consultation must begin at the earliest opportunity, but the law specifies certain statutory minimum periods, for example, if a hundred or more employees at an establishment are to be dismissed in a ninety-day period, consultation must begin ninety days before the first dismissal takes effect.

The redundancy consultation provisions were supplemented by the Transfer of Undertakings (Protection of Employment) Regulations 1981, which also implemented

²⁴¹Bob Hepple, *Main Shortcomings and Proposals for Revision of Council Directive 77/187/EEC* (December 1990)(Report for the Commission of the European Communities, unpublished).

²⁴²*Id.* at 118.

²⁴³Secs. 99-107 of the EPA 1975, which can be seen as the procedural extension and counterpart of the Redundancy Payments Act 1965.

²⁴⁴TURER 1993, sec. 33(5).

²⁴⁵TURER 1993, sec. 33(5).

an EC Directive.²⁴⁶ These enactments introduced some element of "participation" in major decisions affecting workers in an area which is seldom covered by collective bargaining. The distinction between consultation and negotiation can be described in terms of the extent to which the two processes restrict managerial prerogative. Consultation implies that an employer always formally retains the right to decide after having received representations from employees and making reasoned replies. Negotiation involves dealing with the representatives of employees with the aim of reaching an agreement. An employer may make a unilateral decision only after negotiations have failed. Although this distinction between the processes of negotiation and consultation is generally accepted, the line which separates the two processes is sometimes difficult to draw. Consultation may fall just short of full-scale negotiations, a point which seems to emerge from the provisions of the Transfers and Collective Redundancies Directives. The Directives provide for "consultations" with workers' representatives "with a view to reaching an agreement",²⁴⁷ or "with a view to seeking agreement,"²⁴⁸ phrases which were initially deliberately omitted from the UK Regulations, but then added by the amendments in TURER.²⁴⁹

The requirement of consultation can potentially have far-reaching effects which were described by the Employment Appeal Tribunal in one case as follows:

"The consultation may result in new ideas being ventilated which avoid the redundancy situation altogether. Equally it may lead to a lesser number of persons being made redundant than was originally thought necessary. Or it may be that alternative work can be found during the period of consultation."²⁵⁰

However, in practice, the collective right to consultation has had a much smaller impact and the main concern has usually been the amount of compensation for the individual employee. Part of the reason for this has been the way the legislation was drafted. Before recent legislative amendments the definition of consultation only required an employer to consider representations made by trade

²⁴⁶Transfer of Undertakings (Protection of Employment) Regulations 1981, S.I. 1981, No. 1794 as amended in minor respects by S.I. 1987, No. 442 (TUPE) and by Trade Union Reform and Employment Rights Act 1993 (TURER). These Regulations were made under the European Communities Act 1972 (ECA) sec. 2(2).

²⁴⁷Directive 75/129.

²⁴⁸Directive 77/187.

²⁴⁹TURER 1993, secs. 32(6) & 33(2)(b).

²⁵⁰*Spillers-French (Holdings) Ltd. v. USDAW*, [1980] I.C.R. 31, 37 (E.A.T.).

union representatives, reply to them and state reasons for the rejection of any of them.²⁵¹ Formulated like this, consultation could easily amount to an empty gesture. The process of consultation has been given more teeth with legislative changes which require the consultation to be about ways of avoiding the dismissals, reducing the number of employees to be dismissed, and mitigating the consequences of the dismissals.²⁵² These requirements will make it more difficult for employers to treat consultation as a sham exercise, as long as they heed the warning of the EAT that "there must be time for the union representatives who are consulted to consider properly the proposals that are being put to them".²⁵³

A fundamental danger is that an employer can avoid the consultation obligations completely by refusing to recognise a union. The Transfers Directive does not define the "representatives of employees" with whom employers are required to consult in transfer situations,²⁵⁴ but leaves it to the laws or practice of member states to provide for representatives.²⁵⁵ In terms of the UK Regulations, consultation rights apply only to representatives of an independent trade union²⁵⁶ which is recognised by an employer.²⁵⁷ As the UK has no legal provision for the designation of employee representatives for bargaining and other purposes,²⁵⁸ an employer can choose not to recognise a union and avoid the obligation to consult.

Determination of the question whether a union has been recognised in order to benefit from consultation rights, can be problematic. The legal definition provides that recognition can be "to any extent, for the purpose of collective bargaining".²⁵⁹ This phrase has been interpreted not to refer to "the strength or conviction of the

²⁵¹EPA 1975, sec. 99(7).

²⁵²TURER 1993, sec. 33(2)(b).

²⁵³*TGWU v. Ledbury Preserves (1928) Ltd.*, [1986] I.R.L.R. 492 (E.A.T.).

²⁵⁴Art. 6, Directive 77/187.

²⁵⁵Art. 2, Directive 77/187.

²⁵⁶In terms of the EPA 1975, sec. 8 a certification officer has to certify a union as "independent", an indication that the union is not under the domination or control of, or liable to interference by, an employer.

²⁵⁷TUPE 1981, Regulation 10(5).

²⁵⁸Rights for independent trade unions to seek recognition for collective bargaining by employers (EPA 1975) were repealed by the EA 1980.

²⁵⁹EPA 1975, sec. 126 (1).

recognition but to the subjects or areas to which it relates. In other words, there may be partial recognition, that is, recognition in certain respects but not others.²⁶⁰ Recognition which falls short of recognition for the purpose of collective bargaining is thus excluded from the statutory definition. Before an employer will be held to have recognised a union, the Courts require "clear and unequivocal" evidence which may involve a course of conduct over a period of time.²⁶¹ Generally, the cautious approach by the Courts has been characterised by an underlying concern for the consequences and "severe risks"²⁶² of recognition for the employer. Factors which the Courts have taken into account to decide whether an employer has recognised a union, include the existence of a collective agreement which usually has to be accompanied by relevant acts of the particular employer.²⁶³

Restriction of consultation rights to recognised trade unions can be seen as implicit legal support for the agents and process of collective bargaining. The duty to consult over proposed transfers of business only applies to employers who have clearly expressed their decision to negotiate over collective bargaining subjects. While the reason for restricting consultation in this way is easy to detect, justification for the narrow application of consultation rights is more problematic. The UK has no statutory provision for employee representation, and unions may be regarded as the most obvious avenue for consultation proceedings. However, the EC Directive has made a clear choice for consultation, albeit consultation "with a view to reaching an agreement", instead of negotiation.²⁶⁴ Since something less than negotiation is envisaged, there is no necessity for trade union representation to be the exclusive channel of representation for both processes. In other European countries it is common for legislation to require consultation with forms of employee representation at workplace level, such as works councils. It can be argued that consultation duties which derive from the UK's obligation to implement the EC Directives may benefit from a broader application than the one given under the UK law at present. With a small

²⁶⁰*NUGSAT v. Albury Bros. Ltd.*, [1977] I.R.L.R. 173, 175 (E.A.T.).

²⁶¹*Joshua Wilson & Bros. Ltd. v. USDAW*, [1978] I.R.L.R. 120 (E.A.T.).

²⁶²*USDAW v. Sketchley Ltd.*, [1981] I.R.L.R. 291 (E.A.T.).

²⁶³*NUGSAT v. Albury Bros. Ltd.*, [1978] I.R.L.R. 504 (C.A.).

²⁶⁴Early drafts of the Directive envisaged negotiations with a view to reaching an agreement ((COM. No. 75) 429 final (25 July 1975), and (COM. No. 74) 351 final (21 June 1974)).

but significant change of emphasis it will be possible to extend consultative mechanisms. Such a move will enhance the possibilities of worker participation, and at the same time follow trends which can be perceived in current British industrial relations practice. There are signs that employers are moving away from collective bargaining towards joint consultation and direct communication with employees; a growth in consultative machinery has been a general phenomenon.²⁶⁵ Forums incorporating union as well as non-union worker representatives have been established and centrally-formulated union policy is no longer the only expression of employee needs.

UK legislation, in addition to restricting consultation rights to recognised trade unions, provides employers with a broad defence which may allow them an escape from the duty to consult. To be relieved from the obligation, a transferor or transferee has to show that "there are special circumstances which render it not reasonably practicable for the employer to comply".²⁶⁶ The "special circumstances" defence is identical to the defence provided for in redundancy situations.²⁶⁷ In that context the Court of Appeal has indicated three steps which an employer has to go through to comply with the defence. The first two steps involve establishing that there were "special circumstances" and that these circumstances rendered compliance with the consultation duties not reasonably practicable. Finally, it has to be shown that, in the circumstances, the employer took such steps as were reasonably practicable.²⁶⁸ "Special circumstances" were defined in one case as "something out of the ordinary run of events, such as, for example, a general trading boycott"²⁶⁹. Included in the definition were events such as a sudden disaster, physical or financial, causing a shutdown. According to another case, circumstances which were "neither sudden in onset nor unforeseeable" did not qualify as "special".²⁷⁰ Accordingly, an employer's failure to consult was found to be justified in cases of insolvency due to the withdrawal

²⁶⁵Neil Millward and Mark Stevens, *British Workplace Industrial Relations* (The DE/ESRC/PCI/ACAS Surveys)(Aldershat 1986).

²⁶⁶TUPE 1981, Regulation 10(7).

²⁶⁷EPA 1975, sec. 99(8).

²⁶⁸*The Bakers' Union v. Clarks of Hove Ltd.*, [1978] I.R.L.R. 366 (C.A.).

²⁶⁹*Id.* at 366.

²⁷⁰*Angus Jowett & Co. v. NUTGW*, [1985] I.R.L.R. 326 (E.A.T.).

of a prospective purchaser²⁷¹ or inability to obtain a Government loan.²⁷² The TURER amendments now specify that failure of a person controlling the employer to provide information to the employer, will not constitute special circumstances.²⁷³ Although this narrows the defence somewhat, the potentially wide application is cause for concern, especially since no such exception is authorised by the Directive.²⁷⁴

The hesitancy with which the law extends a limited amount of employee influence becomes more evident when it is considered that legal intervention in the procedural aspects of the consultation process is confined to the consequences of a transfer rather than over the transfer itself. It is only when measures in relation to conditions of work or employment are envisaged that a transferor or transferee is under a duty to consult.²⁷⁵ This restricted ambit moderates the influence which the law can have as a measure of industrial democracy. The legal sanctions for breach of the duty to consult do not help to make it more effective. The Directive does not provide for a specific sanction for breach of this duty, but leaves it to be determined by Member States, subject to the usual requirement that the sanction be an effective one.²⁷⁶ In the UK, the amount of compensation payable to affected employees is limited to a sum which the tribunal considers just and equitable having regard to the seriousness of the employer to comply with the duty, but with a maximum of four weeks' pay in respect of any employee.²⁷⁷

²⁷¹*USDAW v. Leancut Bacon Ltd.*, [1981] I.R.L.R. 295 (E.A.T.).

²⁷²*Hamish Armour (Receiver of Barry Staines Ltd.) v. ASTMS*, [1979] I.R.L.R. 24 (E.A.T.).

²⁷³TURER 1993, sec. 33(2)(c).

²⁷⁴Bob Hepple and Angela Byre, *The Application of EEC Labour Law in the United Kingdom* 15 (September 1988) (Study commissioned by the Directorate General for Employment, Social Affairs and Education of the Commission of the European Communities).

²⁷⁵Directive Art. 6(2); TUPE 1981, Regulation 10(5). The duty to consult a recognised trade union when the employer envisages taking any "measures" in relation to employees has been amended so that the consultation must take place "with a view to seeking their agreement to measures to be taken" (TURER 1993, sec. 32(6)).

²⁷⁶*Von Colson v. Land Nord-Rhein-Westphalia*, [1984] E.C.R. 1891 (E.C.J.); *Harz v. Deutsche Tradax*, [1984] E.C.R. 1921 (E.C.J.).

²⁷⁷TUPE 1981, Regulation 11(11) as amended by TURER 1993, sec. 32(7)(b). The provision which allowed the compensation to be set off against any payment made as compensation for failing to consult on redundancy was removed by TURER sec. 32(7)(a). Similarly, compensation for failure to consult over collective redundancies can no longer be offset against payment made in respect of the protected period representing damages for breach of contract or some other sum due under the contract (TURER sec. 33(3)). A protective award will, therefore, no longer be decreased because an employer has paid compensation in regard to other matters.

The fact that the consultation requirement in the UK has been toned down by the absence of a legally backed recognition procedure, ineffective and individualistic sanctions and a broadly formulated escape clause which has been given a wide interpretation by the Courts,²⁷⁸ detracts from the ideal of participation and industrial democracy.

Information

Whenever an employee may be affected by a transfer, the employer is under a duty to provide information to representatives of a recognised trade union.²⁷⁹ The Regulations provide some detail as to the content of the information but other particulars are shrouded in vagueness. The information to be given must encompass the approximate date of the transfer, the reasons for it, the legal, economic and social implications of the transfer for the affected employees, the measures which the transferor or transferee envisages to take in relation to the employees, and, according to recent amendments, the proposed method of calculating the amount of any redundancy payments to be made (other than statutory redundancy pay) to affected

²⁷⁸Many scholars have remarked on the need for an overhaul of the Court system and the possible need for Labour Courts, for "in real life rights exist only in the decision of the Courts which enforce them." (Lord Wedderburn of Charlton, "The Social Charter in Britain - Labour Law and Labour Courts," 54 Mod. L. Rev. 1, 18 (1991). See also K. Ewing, "Rights and Immunities in British Labour Law," 10 Comp. Lab. L.J. 1, 35 (1988); W.E.J. McCarthy, "The Case for Labour Courts," 21 Indus. Rel. J. 98, 110 (1990)). Proponents of specialist Courts to administer and enforce individual rights at work and collective labour law are usually aware of the tremendous risks, dangers and difficulties involved in their proposals, (Lord Wedderburn at 26) and the dilemma of countering the "powerfulness of the opponents of change." (B. Hepple, "Labour Courts: Some Comparative Perspectives," 41 Current Legal Probs. 169, 186 (1988).) A difficult question to decide is whether existing labour tribunals could be reformed or whether they should be replaced by Courts of a different breed with extended scope. Possible functions of a new type of Labour Court include the co-ordination of individual employment rights to ensure a balanced system; promotion of different forms of negotiation between collective parties; (Lord Wedderburn at 28) recognising the authority of the parties to collective bargaining and the complexities involved in the process of conciliation. (See, e.g., M. Weiss, S. Simitis and W. Rydzy "The Settlement of Labour Disputes in the Federal Republic of Germany" in *Industrial Conflict Resolution in Market Economies* 102 (T. Hanami & R. Blanpain eds., Deventer 1984); E. Blankenburg & R. Rogowski, "German Labour Courts and the British Tribunal System," 13 J.L. & Soc. 67, 82 (1986)). A Labour Court could be composed of lay members, legal judges with specialised training, or a mixture of judges and industrial members in a bipartite or tripartite structure. It could impose remedies of an interim or final nature, which differ from the traditional relief in that it requires steps such as negotiation or conciliation. Another central issue concerns the appellate machinery which would exert final control and determine the relative autonomy of a Labour Court.

All these questions can only be briefly registered here and the list could be expanded to include many more. The important point is to note that there is a pressing need to include resolutions to such questions in an adequate programme for reform to give meaning to a discussion of a framework of positive rights for employment protection and possible restructuring of collective labour law. Adequate procedures and sanctions, and the bodies to administer them are essential for the effectiveness of labour laws and the need to attain industrial justice.

²⁷⁹TUPE 1981, Regulation 10(2).

employees.²⁸⁰ Various aspects relating to the timing of the information are unclear. The Regulations state that a trade union must be informed of "the fact that the relevant transfer is to take place" and specify in general terms that information must be given "long enough before a relevant transfer to enable consultations to take place". It has already been mentioned that consultations are only required when measures are envisaged in relation to employees and do not concern the transfer decision itself. However, the duty to consult has been amended so that the consultations with union representatives must take place "with a view to seeking their agreement to measures to be taken."²⁸¹ Within this enlarged scope for consultation it is arguably incongruous to interpret the Regulations to allow information to be given at a stage when the transfer has been completed or almost completed.²⁸² The stated purpose of information, "to enable consultations to take place," must now be read to include the possibility that information can enable employees to prepare in other ways for changes which may affect their job security and that they may need time, for example, to look for other jobs.

Although the Government managed to limit the procedural aspects of employee consultation to the extent outlined above, it could not avoid conferring significant and substantive individual rights on workers. The Regulations introduced major changes to the existing law in which the idea of the personal non-transferable nature of the employment relationship had prevailed for a long time.

Conclusion

The introduction of legislation to regulate business transfers has brought about a change of direction and opened up new avenues for employees who come into contact with changes of employer; it has undoubtedly altered the balance between the economic demands of business and the social demands of workers. The case for the protection of employees' rights is advanced by the jurisprudence of the European Court of Justice and its close attention to the aim of the Directive. Courts in the UK,

²⁸⁰TURER 1993, sec. 33(2)(a).

²⁸¹TURER 1993, sec. 32(6).

²⁸²The statements of the Court in *Institution of Professional Servants v. Secretary of State for Defence*, [1987] I.R.L.R. 373 (Ch. Div'l Ct.)(decided under the Dockyard Services Act 1986 which re-enacts TUPE Regulation 10 without any material changes) – "long enough before" a transfer excludes mere hopes or possibilities and means "as soon as measures are envisaged and if possible long enough before the transfer" – have to be read in the light of the latest amendments.

following the principle of purposive interpretation, have an obligation to pay attention to the European Court of Justice cases and their underlying philosophy.²⁸³ The tempering effect which this principle has had makes it unlikely that the attitude of the Courts will be a major obstacle in the way of safeguarding employees' rights in the event of transfers of undertakings, businesses or parts of businesses. Therefore the need to look seriously at the Courts which interpret the legislation is not as pressing in this area as it is in areas which are not so closely tied to Community law.

However, employees would be mistaken to think that the law can be strong enough to stem the tide of privatisation to which the UK Government is fully committed. In its pursuit of this major policy objective, the Government has tried to make light of the impact of Community law and the Transfer Regulations, and has suggested that the recent legal amendments have little legal significance.²⁸⁴ It is clear that privatisation and the threat of erosion of employees' terms and conditions of employment will continue. Courts continue to have sizable leeway in interpreting the circumstances of the transfer and the economic, technical or organisational reasons given by an employer for a dismissal. In addition, employees can experience deterioration of their rights through the normal operation of domestic law, because employees who are affected by a transfer have no greater rights than they enjoyed before the transfer took place.²⁸⁵ This means that the normal principles of contractual variation apply, sometimes allowing manipulation to masquerade as agreement.

²⁸³This principle was developed in *Litster v. Forth Estuary Engineering Ltd.*, [1989] I.R.L.R. 161 (H.L.). At the level of the European Communities *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, [1992] 1 C.M.L.R. 305 (E.C.J.) created a general duty to construe domestic law in compliance with Community law. The principle was then applied in *Webb v. EMO Air Cargo (UK) Ltd.*, [1993] I.R.L.R. 27 (H.L.) but with the qualification that *Marleasing* could not be used to defeat the clear wording of a UK statute.

²⁸⁴Brian Napier, *CCT, Market Testing and Employment Rights: The Effects of TUPE and the Acquired Rights Directive 11* (Streatham 1993)(publication sponsored by the Institute of Employment Rights).

²⁸⁵The doctrine of partial harmonisation implies that it is only the protection which employees have under their own systems which is transferred in the event of a relevant transfer. In *Rask and Christensen v. ISS Kantineservice A/S*, [1993] I.R.L.R. 133, 136 (E.C.J.) the E.C.J. reasoned that "insofar as in cases other than on a transfer of an undertaking it is permissible under the national law to alter the employment relationship to the employees' disadvantage, particularly as regards the wage terms, such a change is not prevented merely because the undertaking has been the subject of a transfer in the meantime and the contract is consequently concluded with the new owner of the undertaking."

CHAPTER 4

THE PROTECTION OF WORKERS IN THE CASE OF BUSINESS TRANSFERS: SOUTH-AFRICA

Introduction

The many statutory changes which have been brought about in South African labour law in recent years have not touched upon the common law consequences of a change in ownership of a business. Sanctity of contract is the abiding rule in the case of changes in ownership of the employing enterprise, and the pervasiveness of this doctrine has made it more difficult for the Courts to be innovative or creative in this area than in many other areas of labour law.

When the unfair labour practice definition was introduced into South African labour law,¹ and the Industrial Court was given a very wide discretion to do justice according to the "notion of fairness,"² the idea was to substitute fair employment guidelines³ for the common law's right to be arbitrary about substance and procedure. As a result of these legal changes termination of employment is no longer regulated by legal rights in accordance with the common law -- Roman Dutch law with strong English influence -- but by principles of fairness. The definition of an unfair labour practice has been wide enough to encompass cases of unfair dismissals and retrenchments, a far-reaching concept which is understood to encompass the dismissal of one or more employees for purposes of work-force reduction due to a number of causes, such as plant closure, rationalisation or decreased production resulting from economic decline.⁴ In the context of retrenchments, the Court derived general principles of fair retrenchment from diverse sources and evaluated the

¹The definition of "unfair labour practice" in sec. 1 of the Labour Relations Act was inserted by sec. 1(f) of the Industrial Conciliation Amendment Act 94 of 1979.

²*SADWU v. The Master Cutters' Association of SA*, (1982) 3 I.L.J. 87, 113H (I.C.). See also the recent description of the term "unfair labour practice" as "a mixture of social justice, common sense and labour law - far removed from the ordinary principles of common law ordinarily dealt with by the [C]ourts." (*SACCAWU v. Minister of Manpower*, (1993) 14 I.L.J. 909, 911 (T.)).

³See *Report of the Commission of Enquiry into Labour Legislation Part 1* RP 47/1979 IV para. 4.28.5.2-4.

⁴See *Consolidated Frame Cotton Corporation v. The President, Industrial Court*, (1986) 7 I.L.J. 489, 494 (A.D.), and M.S.M. Brassey, E. Cameron, M.H. Cheadle & M.P. Olivier, *The New Labour Law* 279 n.1 (Cape Town 1987).

circumstances of particular retrenchments in the light of these principles. Reliance on these principles was justified in terms of the unfair labour practice definition's reference to practices that "unfairly affected" or "prejudiced" an employee's work security, and on the ground of the promotion of "sound labour relations."⁵

Although the Court's guidelines on retrenchment have been applied in transfer situations, the application has been piecemeal and has mostly affected procedural aspects of a transfer. Without a sound basis for intervening in cases concerning a change of employer, it has been possible for the Court to hold that the common law can provide all the substantive intervention that is required. The authority of the common law, which has stymied novel interpretations of the open-textured unfair labour practice concept in transfer situations, appears to stem from the deeply ingrained and widely accepted view that the Court cannot make a contract for the parties.⁶ This understanding is not likely to change without intervention by the legislature.

The common law doctrine has an equitable foundation; its autochthonous premises were developed to provide protection for employees faced with a change of employer. Yet, in most instances it operates so as to discriminate against employees. The discriminatory effect of the common law is obvious in most transfer situations, including those which also involve business closures or insolvencies. In the next section, the shortcomings of the common law with regard to transfers of businesses will be pointed out. It will be shown that even in circumstances where the transferor and transferee are in some way connected to each other, the harsh consequences of the common law can only be overcome with great difficulty. Following that, a brief exposition of the position of employees in the case of insolvent undertakings will follow. In the final section of this chapter the inadequacies of arrangements for participation will be considered. In general, this chapter will expose the dilemma of employees who are confronted with structural business changes, and will call attention to areas of confusion which require intervention by the Courts and the legislature.

The common law position

At common law there is no automatic continuity of employment when an

⁵*Gumede v. Richdens t/a Richdens Foodliner*, (1984) 5 I.L.J. 84, 91 (I.C.).

⁶*See, e.g., Lathe v. Impala Holiday Flats*, (1993) 14 I.L.J. 1074, 1082 (I.C.).

undertaking is transferred. Because of their personal nature, contracts of employment cannot be transferred by way of cession to a new employer, but can only be renewed with the consent of all the parties involved: the old and the new employer, as well as the employee.⁷ The transfer normally results in the termination of the employees' original contracts of service,⁸ even if it involves an offer of re-employment by the transferee. Change of employer will amount to a dismissal which will be lawful as long as there is compliance with the terms of the contract and the termination is preceded by the requisite notification or notice. In the case of contracts which were entered into for an indefinite period, due notice will render the termination lawful; no notice, short notice or any other breach of the contract will be regarded as wrongful, giving rise to a claim for wrongful dismissal against the transferor. Where the contract was entered into for a fixed period, unilateral termination can only occur in exceptional circumstances when there is a serious breach. Transfer of employment without the employee's consent usually amounts to a repudiation of the contract. As long as the contract continues, an employer is obliged to pay an employee wages against a tender to serve, regardless of whether the employee have done any work. A mere willingness to work is sufficient.⁹ An agreement which may be arrived at will normally be enforced by the Courts, but in the absence of an agreement, the common law's concern is to avoid the automatic transfer of contracts of employment.

The rule as to the non-transferability of contracts of employment originated as a protection for the individual employee to preserve the employee's freedom of choice, as the following remarks in the English case of *Nokes v. Doncaster Amalgamated Collieries Ltd.*¹⁰ illustrate:

"[A] free citizen, in the exercise of his freedom, is entitled to choose the employer whom he promises to serve, so that the right to his services cannot be transferred from one employer to another without his assent."

In the case of *Nokes*, a colliery worker was accused by his apparent employer, the transferee, of breaking his contract of employment. The Court found that a workman was justified in refusing to allow his contract to be transferred to another company and that there was therefore no contract in force. In defending the inalienable right of an

⁷See R.H. Christie, *The Law of Contract in South Africa* 464 (Durban 1981).

⁸*Ntuli v. Hazelmere Group t/a Musgrave Nursing Home*, (1988) 9 I.L.J. 709, 713 (I.C.).

⁹*Johannesburg Municipality v. O'Sullivan*, 1923 A.D. 201; and see M.S.M. Brassey, E. Cameron, M.H. Cheadle & M.P. Olivier, *The New Labour Law* 133 (Cape Town 1987).

¹⁰*Nokes v. Doncaster Amalgamated Collieries*, 1940 App. Cas. 1014, 1020 (H.L.).

employee to choose an employer, the Court refused to let the company's interests outweigh the importance which employees may attach to the identity of the particular company with which they deal. The protective function ascribed to the common law in *Nokes* has, however, not been able to shield employees from harm or injury in similar cases. Notwithstanding the obvious concern for the employee which led originally to the avoidance of automatic continuity of service, the common-law contractual principles concerning transfer of employment have in most instances been manipulated to operate against the interests of employees.

In the first South African case which dealt extensively with the consequences of the transfer of an undertaking, it became clear that employees' right to choose an employer does not compensate for the risks and serious problems resulting from a transfer. In *Ntuli v. Hazelmere Group t/a Musgrave Nursing Home*¹¹ the services of the entire staff of a nursing home were terminated after the sale of the business to a new proprietor. The main reason for their retrenchment was the introduction of a new "rota" system which would have created transport difficulties for some of the employees. The employees indicated, however, that they would have worked the new shifts despite the difficulties if it meant that they could have retained their employment.¹²

The applicant employees submitted that there was no break in their service as a result of the change of ownership of the nursing home and complained that the transferee did not follow the proper procedure regarding retrenchment. The Court rejected the employees' submission on the ground that the common law granted a transferee freedom to choose which employees to engage in the acquired undertaking, in addition to the freedom to rearrange the business operations. In this case, the transferee had taken all reasonable steps in retrenching the employees and the Court accepted that the selection of employees had not been arbitrary, but had been based on business or operational considerations. An important factor which the Court took into account to absolve the transferee of all responsibility towards the employees, was the fact that the engagement of the staff was conditional in law since the transferee had informed the employees that their engagement was subject to the proviso that a number of staff would be retrenched at the end of the first month after the transfer.

¹¹(1988) 9 I.L.J. 709 (I.C.).

¹²*Id.* at 711-12.

The Court stated that, in equity, the respondent did not engender any reasonable expectation that the employees could rely on the security of their tenure beyond the first month.¹³

A transferee will only incur liability for compensation in circumstances where the employees have been offered security of tenure and subsequently retrenched. In these circumstances the transferee would be expected to compensate the employees for their whole period of service in the undertaking, including their period of service for the transferor.¹⁴ However, if the transferee does not retain the employees for a reasonable period, they have to look to the transferor for relief. A reasonable period is described as "one sufficiently lengthy to have eliminated the problems relating to staff which often accompany a change in management."¹⁵ Moreover, a reasonable period should not be too lengthy so that the transferor experiences uncertainty as to his contingent liability for possible retrenchments.

The underlying reason for imposing liability on the transferor is that the employer "who has had the benefit of the services of the employees should bear the brunt of any compensation to which they may be entitled".¹⁶ This reason was considered by the Court to be fair to the transferor under the circumstances. Fairness to the employees, however, received only scant attention and the Court refrained from spelling out the harsh consequences of the common law.

Employees who are subject to a change in the identity of employer suffer a range of undesirable consequences. First, a transfer generally amounts to a dismissal by the transferor employer, leaving employees with no security of employment. Second, a claim for compensation for the loss of their jobs has to be made against the transferor, who is not necessarily financially in a position to comply with a compensation order, particularly in the case of the transfer of a moribund business.¹⁷ Third, a transferee can be entirely selective when it comes to retaining employees and may engage employees on any set of terms and conditions. There is no obligation

¹³*Id.* at 718.

¹⁴*Id.* at 719-20. This of course begs the severance payments debate. See discussion below.

¹⁵*Id.* at 720.

¹⁶*Id.* at 721.

¹⁷The issue was addressed in the case of *Lathe v. Impala Holiday Flats*, (1993) 14 I.L.J. 1074, 1080 (I.C.). See also *SACCAWU v. Steers Fast Food*, (1993) 2 L.C.D. 125 (L.A.C.).

to respect terms and conditions which existed prior to the transfer. In the fourth place, there is no foundation upon which employees can insist that acquired rights be taken up by the transferee and they may lose all seniority or continuity of employment. Finally, a transferee has the option to retain employees who were employed by the transferor for a probationary period, during which they can be dismissed with impunity. In the case of such conditional employment there seems little basis on which to require that the guidelines which normally apply in the case of retrenchments be followed. However, even if the Court required compliance with the guidelines, as the judgement in the *Ntuli* case intimated, this requirement would have little strength considering the scope of the freedom granted a transferee to orchestrate changes in the undertaking.

In short, a transfer of an undertaking wipes out all continuity of employment unless a new owner elects to employ the employees of the transferor and agrees to maintain their terms and conditions of employment. Continuity of service is therefore based on the subjective choice of the transferee, the "assumption of responsibility for the welfare of the employees by the transferee after the lapse of a reasonable period of time."¹⁸ In support of its conclusion which invoked continuity of service after the lapse of a reasonable period of time, the Court referred to the Basic Conditions of Employment Act 3 of 1983 and stated that "the concept of continuity of employment is not unknown in our statutory labour law."¹⁹ These statutory provisions oblige an employer to grant an employee annual leave, to remunerate the employee for that leave and to remunerate the employee in respect of accrued leave. For the purpose of these provisions, "employer" includes the new owner in the case of a transfer of a business but only if the new owner of the business continues to employ the employee of the former owner.²⁰

These concessions to the expectations of employees who continue to be employed in the same job and the same working environment, but with a new employer, grants employees limited rights on transfer of employment. However, many aspects of the concept of "continuity of employment" have never been addressed in

¹⁸*Ntuli v. Hazelmere Group t/a Musgrave Nursing Home*, (1988) 9 I.L.J. 709, 720 (I.C.).

¹⁹*Id.* at 721. The Court did not refer to the only other statute which appears to provide for limited continuity of employment. The Manpower Training Act 56 of 1981 sec. 22(5)(a) provides for an automatic transfer of contracts of apprenticeship entered into with a partnership in the event of the partnership dissolving and the business being continued by a new person or partnership.

²⁰Sec. 12 of the Basic Conditions of Employment Act 3 of 1983.

South African law and the obligations of a transferee who chooses to retain employees of the former employer for longer than a reasonable period of time have barely been dealt with. A transferee's liability can extend to the payment of retrenchment benefits, according to the Court in *Ntuli*, and to remuneration for leave, according to the Basic Conditions of Employment Act. The continuation of many other acquired rights of employees are, however, uncertain and many questions remain unanswered. Is the transferee under an obligation to respect seniority rights of the employee? Can claims which arise from the employment relationship with the transferor, such as for commission or bonuses, be made against the transferee after the lapse of a reasonable period of time? Can the transferee be expected to observe terms and conditions collectively bargained with the transferor? Does re-engagement of the work-force by the transferee imply preservation of the legal status and function of employee representatives? Does the concept of continuity of employment only apply to a takeover of a business as a going concern, or also to a takeover of assets which are used in a slightly different business, but with employees doing the same work?²¹ Strong arguments can be made to give positive answers to most of the above questions but while the uncertainty persists it can only harm sound labour relations.

Transfer - piercing the corporate veil

In *Ntuli* the Court did not find it necessary to consider transfers other than those concerning a sale "lock, stock and barrel."²² Moreover, in *Ntuli* the Court dealt with a transfer of a company from a transferor which was not associated with the transferee. However, the responsibilities of the transferor and the transferee of an undertaking towards the employees in circumstances where the former and new proprietor were in some way connected to each other, have been addressed in other cases. The Court has expressed itself in favour of taking a common-sense and equitable approach to the determination of the real employer of the employees²³ and has come to the aid of employees in situations where there was evidence of sham

²¹It is to be hoped that the restrictive approach taken in English law in cases such as *Woodhouse v. Peter Brotherhood Ltd.*, [1972] I.C.R. 186 (C.A.) and *Melon v. Hector Powe Ltd.*, [1980] I.R.L.R. 477 (H.L.) can be avoided.

²²*Ntuli v. Hazelmore Group t/a Musgrave Nursing Home*, (1988) 9 I.L.J. 709, 721 (I.C.).

²³*The Media Workers Association of SA v. Facts Investors Guide (Pty.) Ltd.*, (1986) 7 I.L.J. 313 (I.C.) per Fabricius A.M.

transfers or gratuitous transfers. In *SAAWU v. Contract Installations (Pty.) Ltd.*,²⁴ "lifting the corporate veil" revealed a position where a private company was in a hand-in-glove situation with a close corporation. The Court summarized the factual position as one in which the two companies were "in mind and management ... one and the same" and held the close corporation responsible for the unfair retrenchment of the employees of its associate which had gone out of business.²⁵ The Court also enquired into the identity of the "real employer" in *Roshanlall v. Design Three*.²⁶ In this case employees were transferred to a private company, without consultation or consent, and later dismissed. The transferor company was owned and managed by a sole trader, who was also sole director and shareholder of the private company. The Court found that the dismissal was unfair and issued a reinstatement order.²⁷ Similarly, in a case where the evidence disclosed that the "closure" of one company and "opening" of another amounted to a stratagem to get rid of a portion of the workforce so as to avoid compliance with fair employment and bargaining practices, the Court made a finding of unfair retrenchment. The Court accepted that the second business was in all material aspects the same as the first, that its address, buildings, management structure, financing and customers remained unchanged, and that the goodwill remained vested in the same director.²⁸

"Piercing the corporate veil" was considered once more in *SACWU v. Chemco Laboratories (Pty.) Ltd. & Delta Distributors (Pty.) Ltd.*,²⁹ a case which concerned a company's rationalisation programme resulting in the formation of several separate

²⁴*SAAWU v. Contract Installations (Pty.) Ltd.*, (1988) 9 I.L.J. 112 (I.C.).

²⁵*Id.* at 114-15.

²⁶*Roshanlall v. Design Three*, (1989) 10 I.L.J. 1162 (I.C.).

²⁷The Court indicated that the order could be complied with by employing them in the transferor company, or by "causing" them to be employed in the transferee company. Similarly, in *De Vries v. Lanzerac Hotel*, (1993) 14 I.L.J. 1460, 1465 (L.A.C.), a reinstatement order was made against a partner in a body which managed a hotel. The Court was of the opinion that if this partner had no work for the reinstated employees, it might subcontract them to the partnership or transfer their contracts of service to the partnership.

²⁸*SACWU v. Toiletpak Manufacturers (Pty.) Ltd.*, (1988) 9 I.L.J. 295 (IC). A similar finding was reached in *Paper Printing Wood & Allied Workers Union v. Lane N.O. as Trustee of Cape Pallet C.C. (in liquidation)*, (1993) 14 I.L.J. 1366 (I.C.). But in *Lathe v. Impala Holiday Flats*, (1993) 14 I.L.J. 1074 (I.C.), even though the employees believed that the change in ownership was not a real change, the Court considered it to be a case of retrenchment.

²⁹*SACWU v. Chemco Laboratories (Pty.) Ltd. & Delta Distributors (Pty.) Ltd.*, Unpublished judgement of the Industrial Court, Case No. NH 11/2/1688, 23-25 October 1989.

corporate entities. The restructuring was a bona fide rationalisation process directed at better focus and financial control in the business. Although many of the new entities had existed in some form as part of the larger company before the rationalisation, the reorganisation brought about changes in the scope of their operations. To provide for the particular focus of the various companies, interests and assets were sold to them by the original holding company. The re-apportionment of functions necessitated a re-assignment of staff to the new companies. Employees, although they continued with substantially the same functions performed at the same premises, were assigned to new employing entities.

The Court had little difficulty in finding that the group of companies involved in the matter could be described as one "economic entity", a term which implied that the separate legal entities of the various holding and subsidiary companies in the group could be disregarded for certain purposes.³⁰ Support for this finding was gained from the fact that the separate legal entities remained one business, operating for the benefit of the shareholders. Since the different companies formed part of the economic unit represented by the constituent group, the actions of management had to be judged in the wider context of the business.

The facts of this case can best be summed up in terms of the adage that the more things change, the more they remain the same. Similarities and changes resulting from the process of corporate restructuring led to the bafflement of the employees; it also left the Court in a quandary. Despite the changes brought about by the restructuring, management intended to continue with the employment of the employees and it was never the intention to retrench existing personnel from the business. However, the same managerial officials, acting in a dual capacity for both the previous and the future employer, gave the employees first notice of termination, and subsequently offered them employment in the new company. The employees were confronted with a situation in which they were to perform their duties at the same place and in substantially the same way, yet they learned that their future employer would be a new legal entity. Since the employment was offered on terms and conditions which were less favourable than those which persisted in their employment with the previous employer, they refused to accept these terms, and as a result lost their jobs. For the employees, the enterprise was characterised more by the similarities which they perceived in the continuum of the employing enterprise, the

³⁰*Id.*

work environment, plant, machinery, supervisors and management than by the identity of the legal proprietor alone and they expected their working conditions to continue.

The Court was faced with the dilemma of reconciling, on the one hand, the formation of a separate corporate entity to perform operations which had previously been within the scope of another company and, on the other hand, the fact that both these companies formed part of one "economic entity." Between Scylla and Charybdis, the Court found it difficult to avoid one peril without running into the other. While steering this complicated course, in an attempt to tide it over the difficulty, the Court devised a cumbersome construction. It distinguished between two components in the employment situation, the contractual relationship between employer and employee as evidenced by the service contract, and the labour relationship.³¹ According to the Court, the cancellation of the contractual relationship did not immediately result in the extinction of the labour relationship, which might continue until the other party had accepted the finality of the separation or exhausted all the rights in terms of the Act to seek reinstatement of the contractual relationship. The Court found first that there had been a retrenchment; the employees had become redundant to the requirements of the transferor company which no longer had posts for them in its organisational structure. However, since the labour relationship continued, the Court accepted that there had "not really been a retrenchment" and found the transferee guilty of the unfair unilateral amendment of the terms of employment.

A second case presented the Court with facts almost identical to those in the *Chemco Laboratories* case. In *Young v. Lifegro Assurance*³² the Court, faced with a merger situation between two associated employers, held that the dismissal of an employee, subject to and coupled with an offer of employment on the same terms and conditions by the transferee, did not constitute retrenchment. The similarities between the two cases are striking. In *Lifegro*, like in the *Chemco Laboratories* case, the intention of management was at all times that the employees should remain "on board", and not that they should become redundant. In both cases the exercise was clad in a "dismissal/re-employment by a third" format and from this it ostensibly would

³¹See also *BHT Water Treatment (Pty.) Ltd. v. Maritz N.O.*, (1993) 2 L.C.D. 184 (L.A.C.). But cf. the decisions in *Borg-Warner SA v. NAAWU*, (1991) 12 I.L.J. 549 (L.A.C.) and *SACTWU v. SA Clothing Manufacturers*, (1991) 12 I.L.J. 1066 (I.C.).

³²*Young v. Lifegro Assurance*, (1990) 11 I.L.J. 1127 (I.C.).

appear to be a matter of retrenchment. The finding of the Court in both cases was that there was no retrenchment; in *Chemco Laboratories* this finding was to the employees' advantage, but in *Lifegro* the employee was hit with the brutal operation of the common law rule. The facts in *Lifegro* show that, while employees who were not offered re-employment were formally retrenched and received severance pay, the employee who refused an offer of re-employment could not claim retrenchment benefits, mainly because the employee was not made redundant in the sense that he lost his job permanently. Perhaps the most severe aspect of the decision relates to the Court's failure to consider all the implications of the common law rule which grants employees the fundamental freedom to choose an employer. The Court certainly had no justification for condoning the employer's disregard of his right to consent to the transfer of his employment.³³ Inherent in the common law principle which dictates against the automatic transfer of employment, is the assumption that an employer cannot transfer the right to demand an employee's services without the consent of the employee. This assumption alone requires a process of consultation regarding the re-employment of the employee. Not to allow an employee any say in his future employment is to force upon him the worst outcome under a regime in which the common law is the sole ruler.

The procedural requirement of consultation in the context of business transfers will be discussed in detail later in this chapter. Apart from procedural questions, cases such as those discussed above which all deal with transfers between associated employers, raise the interesting question whether the harsh substantive consequences of the common law, which usually results in the termination of the employees' contracts of employment, can be overcome by piercing the corporate veil. Can a transferor company in merger situations be substituted ex lege as employer?³⁴ As much as one would like to give a positive answer to this question, it is not always possible to escape the common law contractual consequences. The common law framework frees a transferee of any obligation actually to hire a transferor's employees. The transferee is normally able to establish its own starting wages and working

³³See the remarks which were made in *NUMSA v. Spinmet (Pty.) Ltd.*, (1993) 2 L.C.D. 36 (L.A.C.): "[U]nder our common law such a transfer is ineffective without the consent of the employee ... [C]ontracts of service are considered to be of a personal nature, so that an employer is not entitled to call upon his employee to serve another employer in his stead."

³⁴See Andrew Breitenbach, "Aspects of the South African Law on Retrenchment in the Light of English Labour Standards," 11 *Indus. L.J.* 1193, 1210 (1990) where he refers to L.C.B. Gower, *Modern Company Law* 201 (3d ed. London 1969).

conditions and to offer them to all job applicants, including the employees working for the transferor.³⁵ There is no sound basis on which the courageous attempt by the Industrial Court in the *Chemco Laboratories* case to overcome these consequences, can be justified,³⁶ and until the South African law introduces provisions similar to the British Transfer of Undertakings (Protection of Employment) Regulations of 1981³⁷ the inescapable conclusion seems to be that the transfer of an undertaking results in the termination of the employment relationship and the retrenchment of the employees.

Insolvency

The common law considered an employer's insolvency to be a breach of contract. An employee whose services were terminated by a trustee or liquidator had a concurrent claim for damages against the insolvent estate.³⁸ In terms of statute, the sequestration of the estate of an employer terminates any contracts of service between the employer and the employees.³⁹ Any employee whose contract has been so terminated may claim compensation from the former employer's estate for any loss which may have been suffered by reason of the termination of the contract of service prior to its expiration. Such a claim is merely a concurrent one but the employee has a preferential claim for salary or wages for a period not exceeding two

³⁵In as far as the Labour Relations Act imposes a duty to bargain, this duty arises in respect of future changes in the terms and conditions of employment. It is submitted, however, that if a transferee wants to retain all or almost all the employees of the transferor without mentioning changes in the terms governing the transferor's employees, such employees have a legitimate expectation that new initial terms of employment will not thereafter be declared unilaterally. The failure of a transferee to announce clearly an intention to set a new set of conditions prior to employing former employees can be seen as an implicit assumption of an obligation to honour previous terms and conditions of employment.

³⁶The same problem pertains to the decision of the Industrial Court in *SACTWU v. Belcanto Nominees No. 2 Ltd. t/a Lansdowne Textile Industries*, (1993) 2 L.C.D. 87 (I.C.), which involved the sale of a company which had been placed under provisional liquidation. After the employees had been working for the purchaser for three weeks, they were presented with new contracts of employment. They refused to accept these contracts without first negotiating about the terms of the contract. As a result of their refusal to sign the contracts, the employer terminated their employment. The Industrial Court found that the employees could not prove a strict contractual relationship with the new employer, but stated that the parties were parties to an employment relationship, and found that the termination of the employment of the employees had been unfair.

³⁷These regulations were designed to implement the EEC Directive on the Acquired Rights of Workers on Transfers of Undertakings.

³⁸See *Clark v. Denny*, 1884 E.D.C. 300.

³⁹Sec. 38 of the Insolvency Act 24 of 1936. See, in general, E. de la Rey, *Mars, The Law of Insolvency in South Africa* 159 (8th ed. Cape Town 1988); Catherine Smith, *The Law of Insolvency* 164-65 (3d ed. Durban 1988).

months prior to the date of sequestration of the estate, within certain limits.⁴⁰ The claim ranks immediately after funeral and death-bed expenses, costs of sequestration and execution, workmen's compensation and contributions to pension, unemployment and other funds. Moreover, if on the date of sequestration any leave is due to the employee, the employee is entitled to salary or wages in respect of the period of leave due, for a certain period and within certain limits.⁴¹ To obtain the benefit of the preference, the employee need not prove the claim formally, but the trustee may require an affidavit in support of the claim.⁴²

Insomuch as the sequestration of the estate of an employer terminates the contract of service with employees, it appears incongruous for the Industrial Court to have held that the Court might not be precluded from reinstating a dismissed employee, even though the contract of employment could have been terminated by the provisions of the Insolvency Act.⁴³ However, in ordering reinstatement, the Court relied on a section of the Labour Relations Act which determines that a reinstatement order made by the Court "shall prevail over any contrary provisions in any law...".⁴⁴ In addition, the Labour Relations Act indicates that "reinstatement" does not necessarily have to be physical.⁴⁵ It is possible to reconcile these provisions of the Labour Relations Act with a section of the Insolvency Act which specifies that an employee is not deprived of a claim for compensation for losses suffered as a result of the automatic termination of his or her employment.⁴⁶ What the reinstatement

⁴⁰Sec. 100(1)(a) of Act 24 of 1936. The list of preferential claims contains no reference of claims such as a long service bonus or redundancy pay. However, two possible bases exist for regarding such claims as preferential claims. It is possible to argue that these payments can be construed as a form of wages which are due to an employee. Alternatively, it can be argued that, if the running of the company is taken over by a liquidator upon liquidation and the employees are re-employed by the liquidator, employees' wages and other outstanding payments to employees should be treated as administration costs.

⁴¹Sec. 100(2) of Act 24 of 1936.

⁴²Sec. 100(3) of Act 24 of 1936.

⁴³*SA Boilermakers, Iron & Steelworkers, Shipbuilders & Welders Society v. SA Cutlery (Pty.) Ltd.*, (1988) 9 I.L.J. 1106 (I.C.).

⁴⁴Sec. 43(6) of Act 28 of 1956.

⁴⁵Sec. 43(7). See *SA Boilermakers Society v. SA Cutlery*, (1988) 9 I.L.J. 1106 (I.C.); *Zipp v. Trac X Spares*, (1989) 10 I.L.J. 1137 (I.C.) and *Zipp v. Trac X Spares*, (1990) 11 I.L.J. 408 (I.C.).

⁴⁶Sec. 38 of Act 24 of 1936.

order therefore amounts to is compensation which ranks as a concurrent claim.⁴⁷

The principles regarding sequestration of an employer's estate do not apply to all instances of insolvent companies. However, these principles do apply in the case of the liquidation of a company whose liabilities exceed its assets, and which is unable to pay its debts.⁴⁸ In order to determine whether a company is unable to pay its debts, it has to be established that the company is in a state of commercial insolvency, which implies that it is unable to meet the day-to-day or current demands upon it in the ordinary course of its business.⁴⁹ Applications to wind up companies on the ground of their commercial insolvency are often opposed on the basis that they are in fact solvent, having assets exceeding their liabilities and the Court in such cases has a discretion to refuse a winding-up order.⁵⁰

Forms of liquidation other than those concerning companies unable to pay their debts, do not automatically terminate the contracts of service with employees, but a liquidator has to elect whether or not to continue with such executory or partially performed contracts.⁵¹ Should the liquidator decide to terminate the contract, the normal procedures with regard to dismissal or retrenchment must be followed and the employee has a concurrent claim for damages against the estate. This is the case,

⁴⁷It has, however, been questioned whether reinstatement can have the effect of swelling the claims of the company's concurrent creditors in this way. See Michael Blackman, "The Employee and the Insolvent Company," 14 Indus. L.J. 543, 546 (1993).

⁴⁸Sec. 339 of the Companies Act 61 of 1973 and see *Woodley v. Guardian Assurance Co. of SA Ltd.*, 1976 (1) S.A. 758, 763 (W.). The decision to wind up a company can be voluntary (made by the members by special resolution - sec. 346) or compulsory (ordered by the Court on the application of a member or a creditor of the company - sec. 346(1)(b)). If an employee qualifies as a creditor (even a contingent or prospective creditor - sec. 346(1)(b)), he or she will have a ground for seeking compulsory winding-up if the company owes him or her at least R100, the debt is due, payment has been demanded, and for three weeks the company has neglected to pay (sec. 344(f) read with sec. 345(1)(a)); or, having obtained judgement against the company, insufficient disposable assets are found to satisfy the debt (sec. 344(f) read with sec. 345 (1)(b)). Alternatively, an employee will have to establish either that the company is in fact unable to pay its debts when they fall due (sec. 344(f) read with sec. 345(1)(c)), or that 75% of its share capital has been lost or has become useless for the business of the company (sec. 344(e)). See, in general, H.S. Cilliers & M.L. Benade, *Corporate Law* 446 (Durban 1987), and Michael Blackman, "The Employee and the Insolvent Company," 14 Indus. L.J. 543 (1993).

⁴⁹*Rosenbach & Co. (Pty.) Ltd. v. Singh's Bazaars (Pty.) Ltd.*, 1962 (4) S.A. 593, 597 (D.). Sec. 38 of the Insolvency Act 24 of 1936 is rendered applicable to such companies by sec. 339 of the Companies Act 61 of 1973.

⁵⁰Sec. 342(1) of the Companies Act provides that in every winding-up the assets are to be applied in the payment of the creditors' claims as nearly as possible as they would be applied in the payment of ... the claims of creditors under the law relating to insolvency (secs. 97 -102 of the Insolvency Act).

⁵¹*Bryant & Flanagan (Pty.) Ltd. v. Muller*, 1977 (1) S.A. 800 (N.) (which was confirmed on appeal at 1978 (2) SA 807 (A.D.)); *Cohen N.O. v. Verwoerdburg Town Council*, 1983 (1) S.A. 334, 352 (A.D.).

for example, where a company is wound up by a Court on the ground that it appears just and equitable to do so.⁵² This ground for liquidation is based on a broad conclusion of law, justice and equity and may be applied when a deadlock in the management of the affairs of the company has arisen from internal disputes. Usually a Court will not intervene if mechanisms exist by which the dispute can be resolved, unless it can be shown that the deadlock renders it impossible to carry on the business of the company.⁵³ Considering the procedures in the Labour Relations Act for the resolution of industrial disputes and the aim of the Act to achieve industrial peace, the Courts will be likely to investigate carefully before granting a winding-up order on just and equitable grounds in the event of a dispute between employer and trade union or employees. However, winding-up may be justified when there is proof of a dispute which upsets the personal relationship of confidence and trust between members who are responsible for the management of the company's affairs,⁵⁴ and arguably, in exceptional circumstances, between management and employees.⁵⁵ This ground for the liquidation of a company may be applicable with regard to firms which, due to their smaller size or nature, depend on friendly co-operation between management and employees to function.

What is the effect of liquidation on collective agreements? Unlike contracts of employment, they do not terminate automatically in the event of liquidation.⁵⁶ Moreover, the liquidator has no power to cancel an agreement unilaterally. If the liquidator wishes, he or she can terminate the agreement lawfully by observing the terms of the agreement; an unlawful termination will amount to a repudiation which will

⁵²Sec. 344(h) of Act 61 of 1973 and see *Rand Air (Pty.) Ltd. v. Ray Bester Investments (Pty.) Ltd.*, 1985 (2) S.A. 345 (W.).

⁵³H.S. Cilliers & M.L. Benade, *Corporate Law* 458 (Durban 1987).

⁵⁴*Moosa v. Mavjee Bhawan (Pty.) Ltd.*, 1967 (3) S.A. 131 (T.); *Erasmus v. Pentamed Investments (Pty.) Ltd.*, 1982 (1) S.A. 178 (W.); *Hart v. Pinetown Drive-In Cinema (Pty.) Ltd.*, 1972 (1) S.A. 464 (D.).

⁵⁵Courts have granted winding-up orders on grounds analogous to those for the dissolution of partnerships, in the case of companies having only a few members, as long as there was proof of a dispute which upset the personal relationship between members. See, e.g., *Moosa v. Mavjee Bhawan (Pty.) Ltd.*, 1967 (3) S.A. 131 (T.).

⁵⁶The reason is that where none of the provisions of the Insolvency Act 24 of 1936 apply, winding-up does not automatically terminate an executory or partly performed contract, and the liquidator must elect whether to perform or render the company liable in damages. See Michael Blackman, "The Employee and the Insolvent Company," 14 *Indus. L.J.* 543, 545 (1993) and B. Jordaan, "Transfer, Closure and Insolvency of Undertakings," 12 *Indus. L.J.* 935, 957 (1991). There is no basis for the decision in *CWIU v. Indian Ocean Fertilizers*, (1988) 9 I.L.J. 1092 (I.C.) in which the argument was accepted that the liquidator could terminate a recognition agreement with the union unilaterally.

give the other party the choice to either cancel the agreement or to hold the liquidator to it. Since one is dealing with an insolvent employer, the latter choice will not necessarily result in specific performance of the contract. If the liquidator decides within a reasonable time not to perform in terms of the contract, the creditor may end up having a concurrent claim for the monetary equivalent of performance.⁵⁷

In addition to dismissals which take place in the context of the winding-up of insolvent companies, employees may be dismissed when a company is placed under judicial management. The purpose of judicial management is to enable companies suffering a temporary setback due to mismanagement or other special circumstances, to become successful concerns once more.⁵⁸ To achieve this aim, the judicial manager has the duty to conduct the management in the manner most economical and which most promotes of the interests of the members and creditors.⁵⁹ The protection of the interests of creditors during the process of judicial management implies that employees' interests may suffer, and that employees can be retrenched or dismissed in the course of the procedure.⁶⁰

Employees appear to bear the brunt of the risk of business failure, while the law of insolvency provides disproportionate protection for the interests of shareholders and creditors. To address this imbalance, it is necessary at least to give serious consideration to the introduction of a guarantee fund for the protection of employees' arrear wages in the event of winding-up or judicial management.

Obligations of the transferor

1. Collective bargaining theory

Introduction

Collective bargaining within the South African legal framework is based upon

⁵⁷See, in general, E. de la Rey, Mars, *The Law of Insolvency in South Africa* 143 (8th ed. Cape Town 1988).

⁵⁸H.S. Cilliers & M.L. Benade, *Corporate Law* 431-43 (Durban 1987).

⁵⁹Sec. 433 of the Companies Act 61 of 1973.

⁶⁰Michael Blackman, "The Employee and the Insolvent Company," 14 *Indus. L.J.* 543, 560 (1993) points out that a judicial management order does not affect employment contracts but that judicial management entails great risks for the employee since the success rate is very low. It is only if the employee is a creditor that he or she can apply for a judicial management order, get information about the company's state of affairs (secs. 427(2), 430 and 431 of Act 61 of 1973), and have any right to be informed and consulted (sec. 433(h)). Employees who are not creditors have no right to be informed about the risks involved or to renegotiate the terms of their contracts.

the same premises as that of the United States and the United Kingdom. The law gives the employer the right to manage the enterprise⁶¹ and imposes few constraints on the employer's wide managerial discretion. However, a degree of industrial democracy has been introduced in areas which concern fundamental business decisions, primarily through legislative changes and judicial interpretation of labour legislation.

Collective Bargaining and the Labour Relations Act

It has become a commonplace to state that the object of the Labour Relations Act⁶² is to promote industrial peace, principally through the mechanism of collective bargaining.⁶³ The aim of achieving industrial peace in South Africa through the process of collective bargaining was first expressed in the Industrial Conciliation Act in 1924, eleven years before this goal was given statutory recognition in the United States with the passing of the Wagner Act. Subsequent South African labour legislation shared the commitment to collective bargaining as the preferred means for dealing with industrial conflict, although for many years the statutory scheme excluded black trade unions. An increase in the number of strikes in the 1970's led to the realization that it was imperative to open voluntary collective bargaining institutions to blacks. It was furthermore realized that to avoid disruption, it would sometimes be necessary for a Court to adjudicate on industrial disputes. The Commission of Enquiry into Labour Legislation⁶⁴ recommended that an Industrial Court be established with the power to hear cases

"of irregular and undesirable practices such as unjustified or unfair changes in the established labour pattern of an employer or other actions which threaten industrial peace or lead to dissatisfaction, [and] of unfair dismissal, inequitable changes in conditions of employment, underpayment of wages, unfair treatment and other cases of grievances".⁶⁵

The Government accepted these recommendations and an Industrial Court was established with two important powers, namely to make status quo orders and to

⁶¹M.S.M. Brassey, E. Cameron, M.H. Cheadle, M.P. Olivier, *The New Labour Law* 74 (Cape Town 1987).

⁶²Act 28 of 1956. All references are to sections of the Labour Relations Act unless stated otherwise.

⁶³See, e.g., *Larcombe v. Natal Nylon Industries, Pietermaritzburg*, (1986) 7 I.L.J. 326, 332 (I.C.); *Bissessor v. Beastores t/a Game Discount World*, (1986) 7 I.L.J. 334, 339 (I.C.).

⁶⁴Professor Wiehahn was the chairman of the Commission of Enquiry into Labour Legislation, the reports and recommendations of which gave rise to many of the key amendments to the statute in 1979.

⁶⁵*Report of the Commission of Enquiry into Labour Legislation*, Part 1 RP 47/1979 IV para. 4.28.5.2-4.

make unfair labour practice determinations.⁶⁶ In 1988 the power to grant urgent interim relief was added.⁶⁷

All three powers of the Court are aimed at constraining and correcting unfair labour practices.⁶⁸ Both the status quo remedy and urgent interim relief allow for the temporary reversal of unfair unilateral action by one of the parties to the employment relationship.⁶⁹ Irrespective of whether urgent interim or status quo relief has been granted, a party may obtain final relief by referring a dispute to the Industrial Court for an unfair labour practice determination.

It was clearly not intended that the Industrial Court should regulate employment matters to the exclusion of the parties themselves. For one thing, the title of the Act provides for "the regulation of terms and conditions of employment by agreement", thereby indicating a pivotal role for the collective bargaining process.⁷⁰ The importance of the institution of collective bargaining is confirmed by the whole structure of the Act. The unfair labour practice jurisdiction of the Industrial Court is

⁶⁶Sec. 17(11)(f) read with sec. 43 (status quo orders) and sec. 46(9) (unfair labour practice determinations).

⁶⁷Sec. 17(11)(a), introduced by the Labour Relations Amendment Act 83 of 1988. The 1991 Labour Relations Amendment Act inserted the requirement in sec. 17D that notice be given to the other party.

⁶⁸The Labour Relations Amendment Act 9 of 1991, which came into effect on 1 May 1991, reintroduced an open-ended unfair labour practice definition, similar to the one that existed prior to 1 September 1988. The definition reads as follows:

"unfair labour practice" means any act or omission, other than a strike or lock-out, which has or may have the effect that -

- (i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardized thereby;
- (ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;
- (iii) labour unrest is or may be created or promoted thereby;
- (iv) the labour relationship between employer and employee is or may be detrimentally affected thereby.

The definition excludes any reference to strikes and lock-outs, with the result that the Court cannot interdict such actions on the basis of unfairness. The Court may, however, in terms of section 17(11)(aA) interdict strikes and lock-outs on the basis of unlawfulness, i.e. non-compliance with the provisions of section 65.

⁶⁹The power of the Court to issue status quo orders is formulated in general terms to include any order which the Court "deems reasonable in the circumstances" (sec. 43(1)). Accordingly, a wide variety of interim orders may be granted to suspend or reverse an unfair labour practice. In circumstances which call for a more urgent remedy, the Industrial Court has been given the power to grant urgent relief which will reverse an unfair labour practice until the grant of a status quo order (sec. 17(11)(a)). Sec. 17D places certain limits on the bringing of applications for urgent interdicts.

⁷⁰"Agreement" is defined in sec. 1(1) of the Act to include agreements concluded by parties to an industrial council or a conciliation board as well as agreements entered into between an employer, on the one hand, and a trade union or group of employees, on the other. The definition covers a variety of agreements such as recognition agreements, or agreed retrenchment procedures.

indirect and can only be exercised if a dispute has first been referred to an industrial council or conciliation board.⁷¹ A proper reference of an unfair labour practice dispute to a council or board is treated as a prerequisite for the assumption by the Court of jurisdiction unless the parties have agreed to omit the conciliation phase.⁷² Industrial councils are permanent bodies established by employer parties and trade unions⁷³ in any "undertaking, industry, trade or occupation"⁷⁴ (excluding state, farming and domestic employment).⁷⁵ The duties of an industrial council are to prevent disputes from arising by the negotiation of agreements, to settle industrial disputes and to regulate matters of mutual interest. Where there is no industrial council, the Act requires that the parties to a dispute apply for the establishment of a conciliation board to consider and, if possible, settle the dispute.⁷⁶ The agreements concluded by these bodies acquire the force of delegated legislation when they are published by the Minister of Manpower in the Government Gazette.⁷⁷ These agreements may deal with virtually any matter of mutual interest to the parties, which means that these agreements may, for example, regulate the transfer of rights of employees in the undertaking in the event of a takeover. While industrial councils and conciliation boards are both collective bargaining forums,⁷⁸ the Act leaves the parties free to regulate their collective relations in private agreements. Invocation of the statutory machinery usually only precedes litigation or industrial action.⁷⁹

⁷¹Secs. 43(2), 46(9)(a) and (b).

⁷²Sec. 46(9)(d).

⁷³Sec. 18.

⁷⁴Sec. 1.

⁷⁵Farmworkers are covered by the Agricultural Labour Act 147 of 1993; domestic workers work under certain minimum conditions granted to them by the Basic Conditions of Employment Amendment Act 137 of 1993; certain public sector employees are accommodated in the Public Service Labour Relations Act 102 of 1993.

⁷⁶Secs. 35 and 36(1).

⁷⁷Sec. 48 gives the Minister of Manpower the power to promulgate industrial council agreements and to extend their operation to non-parties within, and on some occasions even outside, the council's registered jurisdiction.

⁷⁸See *Zuke v. Minister of Manpower*, (1985) 6 I.L.J. 193, 200 (D.); *SAAME v. Minister of Labour*, 1948 (1) S.A. 528, 538 (T.).

⁷⁹Edwin Cameron, Halton Cheadle and Clive Thompson, *The New Labour Relations Act 20* (Cape Town 1989).

The Labour Relations Act advances collective bargaining as the favoured means of resolving industrial disputes. With the object of institutionalising conflict in the economy, it sanctions freedom to belong to trade unions,⁸⁰ to establish collective bargaining forums such as industrial councils⁸¹ and conciliation boards,⁸² and to engage in collective action.⁸³ It is essential to keep in mind that the statutory advancement of collective bargaining and the liberalisation of the process, have also brought restraint through a significant change in the common law. Under the common law little protection was offered against arbitrariness and the party with the greater bargaining power was allowed to extract any bargain, no matter how oppressive.⁸⁴ This meant in fact that the institution itself could be undermined through the exercise of power. The Labour Relations Act, without rejecting the premise that the outcome of collective bargaining will reflect the parties' own understanding of their interests and their relative strength, guards against the erosion of the process, mainly through the unfair labour practice jurisdiction.

The unfair labour practice jurisdiction has been called "supple"⁸⁵ and "open ended in the extreme"⁸⁶ due to the fact that its interpretation revolves around the notion of "fairness". The Court has stated that "the concept of an "unfair labour practice" involves much more than pure law";⁸⁷ the Court, in fact, has to pass "a moral judg[e]ment on a combination of findings of fact and opinions."⁸⁸ Supplementing legal considerations with economic, social and moral concerns in the adjudication of industrial disputes may be desirable and even essential at times, but there is no denying that a completely open-ended approach regarding the ephemeral notion of

⁸⁰Secs. 66, 78 and 79.

⁸¹Secs. 18 and 19.

⁸²Sec. 35.

⁸³Secs. 65 and 79.

⁸⁴M.S.M. Brassey, E. Cameron, M.H. Cheadle & M.P. Olivier, *The New Labour Law* 5 (Cape Town 1987).

⁸⁵Edwin Cameron, Halton Cheadle and Clive Thompson, *The New Labour Relations Act* 21 (Cape Town 1989).

⁸⁶*UAMAWU v. Fodens*, (1983) 4 I.L.J. 212, 224 (I.C.).

⁸⁷*MAWU v. Natal Die Castings Co.*, (1986) 7 I.L.J. 520, 544 (I.C.).

⁸⁸*Media Workers Association of SA v. The Press Corporation of SA Ltd.*, (1992) 13 I.L.J. 1391, 1400 (A.D.).

fairness can easily lead to enduring chaos. This danger is intensified by the Industrial Court's lack of power to lay down guidelines by judicial precedent. Within its wide jurisdiction it is possible for each officer to adhere to an ad hoc approach in deciding what is fair. While a degree of elasticity and flexibility may be required in an industrial relations situation in a state of flux, and while the Industrial Court should be allowed the opportunity to play "its role as an evolutionary catalyst of proper labour relations, especially in the determination of unfair labour practices"⁸⁹ the dangers inherent in this situation and the need for criteria to harmonise decisions have been recognised. Accordingly, it has been proposed that the proper approach should be for the Court to follow a policy of abstention in the area of economic disputes, but to use its adjudicative powers to intervene in disputes of right.⁹⁰ The distinction between disputes of right and disputes of interest has been explained as follows:

"Conflicts of rights (or "legal" disputes) are those arising from the application or interpretation of an existing law or collective agreement (in some countries of an existing contract of employment as well), while interests or economic disputes are those arising from the failure of collective bargaining, i.e. when the parties' negotiations for the conclusion, renewal, revision or extension of a collective agreement end in deadlock."⁹¹

As a theoretical yardstick this explanation has much to recommend it; as a practical measure to be applied in specific situations it is less valuable, mainly due to the area of overlap between disputes over rights and conflicts over interests.⁹² The extent of coincidence between these types of disputes is aggravated by the uncertainty regarding the existence or non-existence of rights, given the wide definition of an unfair labour practice in the Act. Almost any dispute may be brought under the commodious wings of the definition of an unfair labour practice. For example, the restructuring, relocation or sale of a business may have the effect that an employee's employment opportunities or work security are unfairly prejudiced or unfairly jeopardized, or that the relationship between employer and employee is detrimentally affected. It is widely

⁸⁹*MAWU v. Natal Die Castings Co.*, (1986) 7 I.L.J. 520, 544 (I.C.).

⁹⁰Edwin Cameron, Halton Cheadle and Clive Thompson, *The New Labour Relations Act* 100 (Cape Town 1989).

⁹¹International Labour Office, *Conciliation and Arbitration Procedures in Labour Disputes* 5 (Geneva 1980).

⁹²See Benjamin Aaron "Settlement of disputes over rights," in *Comparative Labour Law and Industrial Relations* 337 (R. Blanpain ed., 3d ed. Deventer 1987) where he observes that "the line between disputes over rights and conflicts over interests is not always an impregnable wall; rather, it sometimes is more analogous to a semi-permeable membrane, through which disputes that are nominally of one type pass and are handled under procedures usually reserved for disputes of the other type."

accepted that an unfair labour practice claim involves a determination of rights⁹³ which depends in the first instance upon an interpretation of the Act.⁹⁴ However, for the Court to seek out "the true intention of the legislature as expressed in the Act"⁹⁵ is no easy assignment, especially since the Court's task involves much more than answering "a question of law." The Appellate Division has described the Court's function as follows:

"The position then is that the definition of an unfair labour practice entails a determination of the effect or possible effects of certain practices, and of the fairness of such effects. And, when applying the definition, the [Court] is again expressly enjoined to have regard not only to law but also to fairness. In my view a decision of the [C]ourt pursuant to these provisions is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judg[e]ment on a combination of findings of fact and opinions."⁹⁶

The ambiguity of the unfair labour practice definition and the vague demarcation between disputes over rights and disputes over interests permit a variety of interpretations depending upon different values and assumptions. South African labour law, like that in many capitalist societies, has been influenced by pluralist policies which have delineated the province of worker participation and determined the relationship between collective bargaining and managerial authority.

Pluralist model

Ostensibly, statutory regulation of employment relations in South Africa has increased the opportunities for worker participation in industrial decision-making. The Labour Relations Act unquestionably asserts and encourages collective bargaining and procedural safeguards have been introduced to increase employees' prospects of influencing decisions that may affect their well-being. The unconfined nature of the status quo and unfair labour practice remedies has made it possible for the Industrial Court to apply conceptions of fairness to industrial disputes and to recognise a measure of job security for employees. In deciding cases, the Court has taken heed

⁹³Edwin Cameron, Halton Cheadle and Clive Thompson, *The New Labour Relations Act 97* (Cape Town 1989). But see the criticism which was expressed in *Raad van Mynvakbonde v. Harmony Goudmynmaatskappy Bpk.*, (1993) 14 I.L.J. 183 (I.C.).

⁹⁴*Human v. Workmen's Compensation Commissioner*, 1956 (2) S.A. 461, 464 (T.).

⁹⁵*R. v. Hildick-Smith*, 1924 T.P.D 69, 81.

⁹⁶*Media Workers Association of SA v. The Press Corporation of SA Ltd.*, (1992) 13 I.L.J. 1391, 1400 (A.D.).

of international standards⁹⁷ and, on the whole, has been commended for its even-handedness.⁹⁸ Workers have seen the advantages which can be gained through the Industrial Court in the pursuit of claims against their employers.

Despite the progress which has been made through labour reforms, workers' opportunities to shape the work environment through meaningful participation are limited in significant respects. Notwithstanding the recognition of the collective bargaining process, expression of union needs and participation with management in decisions affecting workers have been limited in accordance with prevailing pluralist assumptions. Pluralist values have influenced the judicial view of collective bargaining relationships and led to an acceptance of the idea that the employer's power is inherent in its control of the production process⁹⁹ and that the employer can lay down the norms and standards of the enterprise.

In the battle between capital and labour, the legislature maintains an apparent neutrality and one commentator has argued that the unfair labour practice jurisdiction is not intended to confer a benefit or advantage on one or the other side. More specifically, it has been argued that it is not the function of the Court to redress the bargaining imbalance that exists between employees and their employers.¹⁰⁰ The same commentator recognises that the parity between capital and labour is a mere formal one and that employees are often in a weaker bargaining position and have to take what the employer is prepared to give¹⁰¹, but ascribes that to the nature of the employment relationship. He describes the employment relationship as one "in which the employee makes over to the employer his capacity to work and produce. The corollary is that the employer can deploy that capacity as he sees fit".¹⁰² Building on the commodity status of labour,¹⁰³ this description suggests the worst outcome

⁹⁷*NAAWU v. Pretoria Precision Castings*, (1985) 6 I.L.J. 369, 378A-B (I.C.).

⁹⁸M.S.M. Brassey, E. Cameron, M.H. Cheadle & M.P. Olivier, *The New Labour Law* 13 (Cape Town 1987).

⁹⁹See *Kahn-Freund's Labour and the Law* ch. 1 (P.L. Davies & M. Freedland eds., 3d ed. London 1983).

¹⁰⁰M.S.M. Brassey, E. Cameron, M.H. Cheadle & M.P. Olivier, *The New Labour Law* 63 (Cape Town 1987).

¹⁰¹*Id.* at 62-63.

¹⁰²*Id.* at 65.

¹⁰³For an analysis of this term, see Richard Hyman, *The Political Economy of Industrial Relations* 20 (London 1989).

of a pluralist collective bargaining relationship in which employee interests are rendered insignificant in comparison to dominant employer concerns. Moreover, it goes against one of the most widely accepted justifications for labour law and labour legislation, which is "to counteract the inequality of bargaining power which is inherent in the employer-employee relationship."¹⁰⁴

The main problem with this exposition is that while it recognises the inevitable constraints of collective bargaining - the fact that the results necessarily reflect the concentration of power between workers and employers - it fails to assess the implications of statutory intervention. In particular, the proposition of Government neutrality acts as a subterfuge to evade the active encouragement of collective bargaining. Government neutrality is not supported by the evidence. On the contrary, the range of constraints in the Labour Relations Act testifies to Government intervention; the Government's role as economic manager is corroborated by statutes such as the Factories Act,¹⁰⁵ the Shop and Offices Act¹⁰⁶ and wage boards established under the Wage Act.¹⁰⁷ It is clear that the South African Government's function involves more than support and assistance; the state itself has a forceful interest in the functioning of the labour market and the process of collective bargaining. The statutory mandate to protect collective bargaining requires that its scope and effectiveness should not be restricted and that every interest should be given due weight. The interests of trade union members, the concerns and difficulties of their working lives are as important as managerial problems and aspirations.

The labels of "voluntarism" and "industrial self-government" are too often used as a mask for non-intervention by the law and the state machinery and for the reinforcement of undemocratic and authoritarian labour relations, contrary to the demands of the statute. Not only is the distinction between the "private" and "public" aspects of industrial decision-making analytically weak; it is also politically unsustainable. As much as intervention in the collective bargaining relationship has to be justified, the state's non-intervention needs justification. Without this abstention can too easily represent support for the stronger party in the employment relationship and

¹⁰⁴*FAWU v. Spekenham Supreme*, (1988) 9 I.L.J. 628, 637 (I.C.).

¹⁰⁵Factories, Machinery & Building Work Act 22 of 1941.

¹⁰⁶Shop and Offices Act 75 of 1964.

¹⁰⁷Wage Act 5 of 1957.

operate in favour of the employer who exercises authoritarian control over employees and every aspect of the work environment. There is judicial decree in abstention as well as in intervention, and an insistence on voluntarism can subvert the entire bargaining institution. This danger has lurked in the Court's approach towards imposing a duty to bargain. Considering the statutory penchant for collective bargaining it is ironic that, in the area of bargaining rights, the law has not assisted trade unions sufficiently.

2. Application of collective bargaining theory in general

Duty to bargain

Worker participation in workplace decision-making has been hampered by the initial ambivalence of the Industrial Court to impose a duty upon employers to bargain with unions representing their employees. This gave rise to a fundamental uncertainty. While the decisions in a number of cases promote a duty to bargain, in other cases the Court has refused to introduce such an obligation and has stressed the voluntarist nature of the collective bargaining relationship.

The Labour Relations Act excludes express reference to a duty to bargain. Where the Industrial Court has imposed a duty to bargain, it has done so on the basis of the unfair labour practice jurisdiction. In *UAMAWU v. Fodens*¹⁰⁸, the Court found that an employer's refusal to bargain constituted an unfair labour practice and the employer was ordered to "commence negotiations in good faith" with the applicant union. The Court noted that the policy of the Act was to encourage collective bargaining, and inferred "that where the majority of the employees should elect to be represented by a registered trade union, the employer could fairly be expected to deal with that union in connection with matters concerning the relationship with its employees".¹⁰⁹

Subsequent cases were unwilling to infer a duty to bargain from the policy of the Act. In the case of *BCAWU v. Johnson Tiles*¹¹⁰ the Court refused to make an order "that a party is to negotiate in good faith", on the basis that the Act went no

¹⁰⁸*UAMAWU v. Fodens*, (1983) 4 I.L.J. 212 (I.C.).

¹⁰⁹*Id.* at 226.

¹¹⁰*BCAWU v. Johnson Tiles*, (1985) 6 I.L.J. 210 (I.C.).

further than to encourage collective bargaining.¹¹¹ This approach was affirmed in *MAWU v. Hart*.¹¹² The Court declined to find that an employer's refusal to bargain at plant level was an unfair labour practice and stated that "negotiations should always assume a voluntary character in order to be effective."¹¹³

The Supreme Court had the opportunity to pronounce on the issue of a bargaining duty in *Natal Die Casting v. President, Industrial Court*.¹¹⁴ Without emphasising the policy considerations underlying this most important issue, Kriek J. held that the "failure of an employer to negotiate in good faith on [employment] matters ...can...have the effects envisaged" in the definition of an unfair labour practice,¹¹⁵ especially those of promoting or creating labour unrest, or detrimentally affecting the employer/employee relationship.¹¹⁶ After this pronouncement, the majority of Industrial Court decisions have indicated a willingness to impose bargaining obligations in appropriate circumstances, to accept the necessity for the parties to attempt to resolve their mutual disputes, and to cast aside the ill-fitting notion of voluntarism in this context.¹¹⁷ An incisive statement in the case of *FAWU v. Spengham Supreme* sums up the broader concerns: "I do not believe that voluntarism has any further right of existence in a system which is principally intended to combat

¹¹¹*Id.* at 213.

¹¹²*MAWU v. Hart*, (1985) 6 I.L.J. 478 (I.C.).

¹¹³*Id.* at 489.

¹¹⁴*Natal Die Casting v. President, Industrial Court*, (1987) 8 I.L.J. 245 (D.).

¹¹⁵*Id.* at 255.

¹¹⁶In *Sentraal-Wes (Ko-op) Bpk. v. FAWU*, (1990) 11 I.L.J. 977 (L.A.C.) Goldstein J. rejected the argument that an employer's refusal to enter into recognition negotiations was not an unfair labour practice because there was no evidence that the negotiations would have been fruitful. According to the judge, the "intention of the Act is to ensure that negotiations take place and to demand evidence of what such negotiations would have achieved would be to negate this important aim of the Act" (at 995A).

¹¹⁷See, e.g., *MAWU v. Stobar Reinforcing*, (1983) 4 I.L.J. 84, 89-90 (I.C.); *Themba v. Nico van Rooyen Taksidermie*, (1984) 5 I.L.J. 245 (I.C.); *Marievale Consolidated Mines v. President, Industrial Court*, (1986) 7 I.L.J. 152, 160 (T.); *NUM v. Marievale Consolidated Mines*, (1986) 7 I.L.J. 123, 149 (I.C.); *MAWU v. Natal Die Castings Co.*, (1986) 7 I.L.J. 520, 453 and 456 (I.C.); *Bissessor v. Beasores*, (1986) 7 I.L.J. 334, 339 (I.C.); *UAMAWU v. SGI Caps Industries*, (1986) 7 I.L.J. 405 (I.C.); *MAWU v. Transvaal Pressed Nuts, Bolts & Rivets*, (1986) 7 I.L.J. 703, 709 (I.C.); *NUTW v. Cape Produce Co.*, (1986) 7 I.L.J. 749, 753 (I.C.); *FBWU v. Transvaal Atlas Wholesale Meat Distributors*, (1987) 8 I.L.J. 335 (I.C.); *Ntsaba v. Eastern Province Textiles*, (1987) 8 I.L.J. 470, 478 (I.C.); *MWU v. African Products*, (1987) 8 I.L.J. 401, 412 (I.C.); *SACWU v. Control Chemicals*, (1988) 9 I.L.J. 606, 618 (I.C.); *MAWU v. Transvaal Pressed Nuts, Bolts & Rivets*, (1988) 9 I.L.J. 696, 701-2 (I.C.); *Luthuli v. Flortime*, (1988) 9 I.L.J. 287 (I.C.) and *Ngiba v. Van Dyck Carpets*, (1988) 9 I.L.J. 453 (I.C.). In *Buthelezi v. Labour for Africa*, (1991) 12 I.L.J. 588 (I.C.) the duty was referred to as "incontrovertible." See also decisions of the Labour Appeal Court, e.g. *Sentraal-Wes (Ko-op) Bpk. v. FAWU*, (1990) 11 I.L.J. 977 (L.A.C.); *Macsteel (Pty.) Ltd. v. NUMSA*, (1990) 11 I.L.J. 995 (L.A.C.).

industrial unrest." In this case the Court had regard to the overriding consideration of "fairness" in South African labour relations and found it "unfair for an employer not to negotiate bona fide with a representative trade union".¹¹⁸

While the issue of the duty to bargain can probably now be regarded as settled, the ensuing question regarding the scope of the bargaining agenda is still open to debate. A disturbing tendency has developed to make a distinction between mandatory and permissive subjects of bargaining, and to exclude the latter from the bargaining agenda. Mandatory subjects have been defined as "issues that arise in the course of employment and have a direct effect on some aspects of employment," while permissive issues have "an indirect effect on the employment relationship."¹¹⁹ Not only are permissive issues regarded to be within the domain of the employer, but the employer is allowed to be the sole arbiter in this matter: "The choice whether or not to submit a permissive issue to collective bargaining remains solely with the employer."¹²⁰ The unilateral introduction of changes in employment conditions which the employer claimed had a commercial rationale, has as a result been condoned as falling within management prerogative.¹²¹

There is no justification for making this kind of distinction between bargaining subjects. Considering that the duty to bargain, in all fairness, can contribute towards industrial peace, any unilateral amendment of the terms of employment of an employee or employees should constitute an unfair labour practice. Unilateral amendment refers to change made without the consent of the other side.¹²² Hence, it will be an unfair labour practice for an employer to change the terms of employment of an employee without bargaining about it first. The denunciation of unilateral changes in the terms of employment of employees has far-reaching implications regarding management's traditional insistence on a "right to manage". A refusal to negotiate on what are defined as "management prerogatives" may be considered

¹¹⁸*FAWU v. Spekenham Supreme*, (1988) 9 I.L.J. 628 (I.C.).

¹¹⁹*SA Society of Bank Officials v. Standard Bank of SA Ltd.*, (1993) 14 I.L.J. 706, 715 (I.C.).

¹²⁰*SA Society of Bank Officials v. Standard Bank of SA Ltd.*, (1993) 14 I.L.J. 706, 715 (I.C.).

¹²¹*Food & General Workers Union v. Sundays River Citrus Co-operative Company Ltd.*, (1993) 2 L.C.D. 56 (I.C.).

¹²²Edwin Cameron, Halton Cheadle and Clive Thompson, *The New Labour Relations Act* 30 (Cape Town 1989).

unfair if it results in changes to terms and conditions of employment.¹²³ Without stating it in clear terms, the only inference which can be drawn is that the South African legislature has adopted the principle of negotiation before introducing changes to work organisation and has thus enhanced the prospects of employees to influence decisions affecting them. Unilateral reorganisation which results in changes in terms and conditions of employment, will only be fair if preceded by bargaining in good faith, a process which has to be approached with the necessary sensitivity to the material interests of both parties.

Workers are not allowed the same degree of participation with regard to all changes in employment terms. With regard to issues concerning retrenchment, for example, the Industrial Court, taking into account international norms, has developed guidelines which only require consultation.¹²⁴ The requirement in South Africa that employers involved in retrenchments have to consult with employee organisations, grants some recognition to the interest that employees have in the future of an enterprise, and challenges the assumption that the employer should be the sole judge of the economic destiny of his property. Consultation implies that employers do not enjoy unlimited rights to decide unilaterally on collective termination, that "entrepreneurial control" is no longer sustained by state force and that employees are allowed some participation in the decisions that drastically affect their lives.

Employee participation is limited, however, by the fact that consultation, as opposed to negotiation, is required in the case of retrenchments. In international context the distinction between consultation and negotiation has been explained as follows:

"[C]onsultation conveys the notion that the employer seeks the advice, and views of his employees, but retains the final decision. Negotiation on the other hand is in general a "method of joint decision-making" involving bargaining between representatives of workers and of employer(s), with the object of establishing mutually acceptable terms and conditions of employment. Negotiation implies an effort to reach agreement by the parties concerned."¹²⁵

Consultation as a participatory procedure does not guarantee that employees will be

¹²³In earlier cases "terms of employment" were regarded to mean the same as "conditions of employment." See *OK Bazaars v. Madeley N.O.*, 1943 T.P.D. 392, 401; *Muehlendorf v. Rand Steam Laundries*, 1945 T.P.D. 317, 323.

¹²⁴The law on retrenchment during the period between 1988 and 1991 was governed by a codified unfair labour practice definition (Labour Relations Amendment Act 83 of 1988). With the repeal of the codification (Labour Relations Amendment Act 9 of 1991), the law is based again on the guidelines which the Industrial Court has developed.

¹²⁵T. Hanami & R. Blanpain, *Industrial Conflict Resolution in Market Economies 4* (Deventer 1984).

able to influence the final decision; indeed, the employer is not bound to follow their views. As far as consultation in general is concerned, it is usually stated that the decision need not proceed from or be congruent with the parties' proofs and arguments.¹²⁶ The process allows great flexibility and the employer has considerable freedom to implement a policy decision based on subjective experience or preferences.

However, to the extent to which the above explanation suggests that consultation leaves employers the final choice without involving any form of agreement, it does not adequately convey the function and purpose of the process. The aim of consultation is for the parties to agree on certain aspects, including alternative measures to retrenchment, selection criteria and a proposed timetable.¹²⁷ With a fine borderline between the processes of consultation and negotiation, and agreement featuring in the nature of both, the prerogatives of control, command and management have been remodelled to allow for a degree of industrial democracy.

Disclosure

A crucial element of the consultation and negotiation processes concerns the disclosure of relevant information. Unions usually regard information as essential to make a realistic assessment of their position in relation to that of the entire enterprise. Employers, on the other hand, are reluctant to concede to any invasion of their privacy and prerogative. The Labour Relations Act, recognising that rational negotiation requires well-informed unions, provides for the supply of information to registered trade unions, through industrial councils, when negotiating an agreement. The function of an industrial council is to attempt to formulate agreements at industry level. In order to arrive at the most suitable agreement, considering the demands of both employers and employees, the industrial council is authorised to procure the necessary information. The Act allows the industrial council to subpoena any person, who in its opinion may be able to give material information concerning the subject of an inquiry, to be interrogated and to produce any book, document or thing relating to such an

¹²⁶Melvin Aron Eisenberg, "Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller," 92 Harv. L. Rev. 410, 414 (1978).

¹²⁷Edwin Cameron, Halton Cheadle and Clive Thompson, *The New Labour Relations Act* 126 (Cape Town 1989).

inquiry.¹²⁸

A difficulty with the provision governing disclosure in the Act concerns the fact that an industrial council consists of equal numbers of representatives from employers and registered trade unions.¹²⁹ Any decision to hold an enquiry requires the concurrence of no less than two-thirds of the representatives present at the meeting at which the decision is taken.¹³⁰ It has been pointed out that this means in effect that the release of information requires the consent of a potential party to a dispute and that it is unlikely that employers will vote to permit an inquiry into their own or other employer's affairs.¹³¹

There are no statutory provisions relating to the disclosure of information during collective bargaining which takes place outside the industrial council system. However, in cases where the Industrial Court has indicated that it has no fundamental objection to the imposition of a duty to bargain, it has regarded the disclosure of information as part of negotiation in good faith. In determining a party's bona fides, the Court has enquired whether the party provided sufficient information to enable the other party to understand and discuss the issues.¹³² In *MAWU v. Natal Die Castings* the Court endorsed the view of Kahn-Freund that "negotiation does not deserve its name if one of the negotiating parties is kept in the dark about matters within the exclusive knowledge of the other which are relevant to the agreement."¹³³

The broad principles associated with possible conflict between disclosure and the need for confidentiality apply equally to cases outside the labour field and to those which concern collective bargaining. That implies that "the [C]ourt should try and strike a proper balance between conflicting interests of the parties...[T]he [C]ourt should endeavour to impose suitable conditions relative to the inspection of documents...so as to protect the respondents as far as may be practicable, whilst at

¹²⁸Sec. 30(1).

¹²⁹Sec. 21(1)(a).

¹³⁰Sec. 27(7).

¹³¹John Brand and Nazeer Ahmed Cassim, "The Duty to Disclose - A Pivotal Aspect of Collective Bargaining," 1 Indus. L.J. 249, 255-56 (1980).

¹³²*MAWU v. Natal Die Castings Co.*, (1986) 7 I.L.J. 520 (I.C.).

¹³³*Id.* quoting Kahn-Freund's *Labour and the Law* 110 (P.L. Davies and M. Freedland eds., 3d ed. London 1983).

the same time affording applicant a reasonable opportunity of achieving its purpose".¹³⁴

3. Application of collective bargaining theory - business transfers and redundancies

Duty to consult

Considering the lack of substantive protection of acquired rights of employees, the main issue in almost every case dealing with a business transfer involves the application of the guidelines on retrenchment, with prior consultation and compensation being central concerns. Since every transfer involves a new arrangement which requires the consent of all the parties involved, the Industrial Court has accepted in most cases that the guidelines should apply.¹³⁵ It does not matter, therefore, whether the object is to retain the employee's services. If this is the object, the arrangement with the employee can take either the form of a novation of the contract or an offer of re-employment. In either case, the employee's consent is required. The Court explained in *NUTW v. Braitex*¹³⁶ that, when a transfer is intended, an employer is obliged to inform the employees well in advance and to consult with them. From the perspective that the guidelines ought to apply in all transfer situations, it is necessary to take a closer look at the origins and substance of these guidelines.

On the basis of the unfair labour practice definition which made indirect reference to practices that "unfairly affected" or "prejudiced" an employee's "work security", the Industrial Court developed general principles or guidelines pertaining to dismissals for operational reasons, which took account of industrial practice, English¹³⁷ and comparative labour law, and international labour standards.¹³⁸ As

¹³⁴*Moulded Components and Rotomoulding SA (Pty.) Ltd. v. Coucoukrais*, 1979 (2) S.A. 457, 466 (W.).

¹³⁵*But cf. CSFWU v. Aircondi Refrigeration*, (1990) 11 I.L.J. 532 (I.C.) and *TGWU v. City Council of the City of Durban*, (1991) 12 I.L.J. 156 (I.C.).

¹³⁶*NUTW v. Braitex*, (1987) 8 I.L.J. 794 (I.C.).

¹³⁷In Britain, the Employment Protection (Consolidation) Act of 1978 consolidates the previous statutory provisions relating to redundancy. The protection against unfair retrenchment is part of English unfair dismissal law.

¹³⁸Applicable Recommendations and Conventions of the International Labour Organization include Convention No. 158, 1982 (Concerning Termination of Employment at the Initiative of the Employer) and Recommendation No. 166, 1982 (Concerning Termination of Employment at the Initiative of the Employer), International Labour Organization, Geneva. See Edwin Cameron, Halton Cheadle and Clive Thompson, *The New Labour Relations Act* 120 (Cape Town 1989).

a result employees have been offered a measure of protection which compares well with international standards. Retrenchment is normally used in a generic sense to indicate the dismissal of one or more employees for purposes of work-force reduction which may be due to, for example, plant closure, rationalisation following upon a merger or a drop in production caused by an economic slump.¹³⁹ The term "retrenchment" was defined by the Appellate Division in *Consolidated Frame Cotton Corporation v. The President, Industrial Court*¹⁴⁰ as meaning "to cut down, to reduce the numbers of the work-force because of redundancy - a superfluity of employees in relation to the work to be performed." Recent attempts to draw a distinction between retrenchment and redundancy, with the implication that the employer's duty is greater in cases of "redundancy" than in cases of "retrenchment", are potentially confusing¹⁴¹ and have no real advantages other than in determining an employer's liability for compensation. With regard to the application of the guidelines which the Court has developed for fair retrenchments, it is submitted that the best approach is to accept that "there is no difference between retrenchments in general and those that follow on the closure of an operation."¹⁴²

Specific conditions which have to be met in the event of termination of employment on grounds other than disciplinary action include prior notice of termination of employment; consideration of ways of avoiding or minimizing retrenchment; prior consultation with the employee or recognised representative trade union or body; and reduction of the number of employees in accordance with reasonable criteria with regard to the selection of such employees. A general condition

¹³⁹M.S.M. Brassey, E. Cameron, M.H. Cheadle & M.P. Olivier, *The New Labour Law* 279 n.1 (Cape Town 1987).

¹⁴⁰*Consolidated Frame Cotton Corporation v. The President, Industrial Court*, (1986) 7 I.L.J. 489, 494 (A.D.).

¹⁴¹In *Hlongwane v. Plastix (Pty.) Ltd.*, (1990) 11 I.L.J. 171, 175-76 (I.C.) the distinction was explained as follows: "Retrenchment is when the employer terminates employees' employment as they have become superfluous due to an economic downturn. The employees consequently lose their jobs, but not necessarily on a permanent basis. Once there is an economic upswing they might possibly get their old jobs back. Redundancy on the other hand means that an employee becomes redundant as a result of, for example, the introduction of new machinery or technology or the restructuring of the business. In the case of redundancy the employee loses his job permanently." In *TGWU, Wilson Nene v. Durban Transport Management Board*, NHN 11/2/2038 (unreported) the Court stated: "to retrench is to reduce one's expenditure or operations. This management response may in some cases be the result of redundancy and may in others be the cause of it. Either way, retrenchment may end up in the loss of jobs, but not necessarily so." See also Andrew Breitenbach, "Aspects of the South African Law on Retrenchment in the Light of English Labour Standards," 11 Indus. L.J. 1193, 1195 n.6 (1990).

¹⁴²*CSFWU v. Aircondi Refrigeration*, (1990) 11 I.L.J. 532, 544 (I.C.).

relates to the rationality of the decision to retrench.

In the first place, fair retrenchment requires prior notification of termination. This requirement incorporates the common law position in terms of which notice is a condition for lawful termination of the contract.¹⁴³ However, in cases involving retrenchment the Industrial Court has gone further than the common law requirement and has always required "sufficient" notice to allow for proper consultation to take place.¹⁴⁴ "Sufficient" notice can be inferred from the condition that prior consultation in regard to termination take place. Meaningful consultation requires advance notification of the intention to retrench an employee.

This approach implies that the period of notice must leave adequate time to satisfy the second condition: discussion of, and agreement upon, alternatives to minimise retrenchments. Since certain alternatives have to be implemented timeously to have any effect, for example a moratorium on hiring new employees, the training or retraining of employees to perform jobs of a different kind, or the implementation of an early retirement scheme, the period could be substantial. In keeping with this approach, the Industrial Court held that it was not sufficient to give notice to the union on the day on which the retrenchments were to be carried out;¹⁴⁵ nor was retrenchment within a day of giving notice regarded as sufficient.¹⁴⁶

Third, retrenchment requires proper prior consultation. Consultation connotes dialogue, deliberation and debate with the aim of seeking information or advice. In essence a two-way process, consultation can be seen as one of a series of interactions between employer and trade union or employees, distinct from true bargaining or negotiation, but involving an exchange of views. Unlike negotiation, consultation does not involve the same efforts to find a compromise solution between two parties, each of whom fiercely protects its particular interests, but it serves a valuable purpose "to enable the worker representatives to bring their influence to bear in good time on management decisions so that alternative measures might be

¹⁴³Edwin Cameron, Halton Cheadle and Clive Thompson, *The New Labour Relations Act* 124 (Cape Town 1989).

¹⁴⁴*NUTW v. Sea Gift Surfware Manufacturers*, (1985) 6 I.L.J. 101 (I.C.); *Simelane v. Audell Metal Products*, (1987) 8 I.L.J. 438 (I.C.).

¹⁴⁵*NUTW v. Sea Gift Surfware Manufacturers*, (1985) 6 I.L.J. 101 (I.C.).

¹⁴⁶*Paper, Printing, Wood & Allied Workers Union v. Delma (Pty.) Ltd.*, (1989) 10 I.L.J. 424, 433 (I.C.).

considered to deal with the underlying problems."¹⁴⁷ Agreement may in fact be needed to effect an alternative to retrenchment, for example, the working of short time¹⁴⁸, temporary lay-off or the transfer of employees to lower-paid jobs.¹⁴⁹ The Court has mentioned that "consultation can rarely be successful without the co-operation of those persons or institutions which must be consulted."¹⁵⁰

In almost every retrenchment case, the failure to consult has been a key issue and the need for consultation has been described as the "cornerstone" of the retrenchment principles.¹⁵¹ Building on this basis the Court has erected a substantive edifice, which has provided room for tripartite consultations in the event of business transfers.¹⁵² In one case the Court concluded that the failure to consult deprived the union of an "opportunity of suggesting a compromise by accepting, for example, alternate work at reduced wages".¹⁵³ In another case the failure to consult was seen to constitute an unfair labour practice because it was conceivable that the union may have influenced the employer -- the Minister of Agriculture who took the decision to privatize the meat inspection functions of his department -- to place pressure on the new company to offer employment to all affected employees.¹⁵⁴ The Court has emphasized that "employees should not be ignored or dealt with in a high-handed manner".¹⁵⁵ The question is whether the employer acted fairly in

¹⁴⁷E. Yemin, *Workforce Reductions in Undertakings* 10 (International Labour Office, Geneva 1982).

¹⁴⁸Edwin Cameron, Halton Cheadle and Clive Thompson, *The New Labour Relations Act* 126 (Cape Town 1989).

¹⁴⁹*GWU v. Dorbyl Marine*, (1985) 6 I.L.J. 52, 58 (I.C.); *Kebezi v. Cementile Products (Ciskei)*, (1987) 8 I.L.J. 442 (I.C.); *NUTW v. Braitex*, (1987) 8 I.L.J. 794 (I.C.); *FAWU v. Ameens Food Products & Butchery*, (1988) 9 I.L.J. 659 (I.C.).

¹⁵⁰*BCAWU v. Masterbilt C.C.*, (1987) 8 I.L.J. 670, 679 (I.C.).

¹⁵¹*Hadebe v. Romatex Industrials Ltd.*, (1986) 7 I.L.J. 726, 734-35 (I.C.).

¹⁵²See *NUMSA v. Metkor Industries (Pty.) Ltd.*, (1990) 11 I.L.J. 1116 (I.C.); *NUTW v. Braitex*, (1987) 8 I.L.J. 794 (I.C.); *Kebezi v. Cementile Products (Ciskei) (Pty.) Ltd.*, (1987) 8 I.L.J. 442 (I.C.).

¹⁵³*GWU v. Dorbyl Marine*, (1985) 6 I.L.J. 52, 58 (I.C.).

¹⁵⁴*NEHAWU v. Director-General of Agriculture*, (1993) 14 I.L.J. 1488, 1501 (I.C.).

¹⁵⁵*Paper, Printing, Wood & Allied Workers Union v. Kaycraft (Pty.) Ltd.*, (1989) 10 I.L.J. 272, 281 (I.C.), quoting *NUTW v. Braitex (Pty.) Ltd.*, (1987) 8 I.L.J. 794, 799 (I.C.). See also *Ellerine Holdings Ltd. v. Du Randt*, (1992) 13 I.L.J. 611, 617 (L.A.C.) in which the Court emphasized the importance of correct and proper procedures in curtailing or eliminating discord in labour relations and in promoting the peaceful resolution of conflict in that field. The employer's cavalier behaviour towards the employee was regarded as "so high-handed and grossly insensitive that [the employee] was entitled to substantial compensation for this."

particular circumstances. The dictates of fairness have been explained as follows:

"Even when a business is genuinely transferred or closed one would expect in all fairness that [the employer] should consider the interests of the work-force as human beings who have families to support..."¹⁵⁶

With regard to the meaning of "consultation" the Court in *Hadebe v. Romatex Industrials Ltd.*¹⁵⁷ stated:

"It is clear that "consultation" does not mean merely affording an employee or his representative an opportunity to make a comment upon, or express an opinion about, a decision already made and which is already in the process of being implemented."

The Court added:

"It is of crucial importance that any discussions on the subject of the proposed retrenchments should be as exhaustive as possible and not be sporadic or superficial ... Consultation involves not only the canvassing of views and suggestions but also the careful, serious and proper consideration of those views before a final decision is reached."¹⁵⁸

Consultation must therefore take place before the final decision is taken.¹⁵⁹

This requirement suggests that consultation should take place as soon as the possibility of retrenchment arises, and that an employer must have an open mind to "discuss the measures which are to be taken to protect the interests of the employees and the preservation of the employment relationship".¹⁶⁰ An employer can never be sure that he has considered all alternatives until he has heard the views of the employees, both regarding ways of avoiding terminations of employment and, if that proves to be unavoidable, ways of minimizing the effects of termination.¹⁶¹

The main weakness with regard to the consultative procedure, which has not been addressed adequately in retrenchment cases, concerns the lack of explanation. As a result, unions have started to demand that employers give proper reasons for

¹⁵⁶*SACWU v. Toiletpak Manufacturers*, (1988) 9 I.L.J. 295, 305H (I.C.).

¹⁵⁷*Hadebe v. Romatex Industrials Ltd.*, (1986) 7 I.L.J. 726 (I.C.).

¹⁵⁸*Id.* at 737.

¹⁵⁹See, e.g., *NUMSA v. Atlantis Diesel Engines (Pty.) Ltd.*, (1993) 14 I.L.J. 642, 650 (L.A.C.) and *Davie v. Punchline Columbia Training Ltd.*, (1993) 2 L.C.D. 299 (I.C.). But cf. *TATU v. Spoomet*, (1993) 2 L.C.D. 323 (I.C.); *Aureli v. Sopex Importers and Exporters (Pty.) Ltd.*, (1993) 2 L.C.D. 296 (I.C.) and *National Union of Leather Workers v. Olympic Footwear - A division of Olympic Flair (Pty.) Ltd.*, (1993) 2 L.C.D. 313 (I.C.).

¹⁶⁰*Ntuli v. Hazelmere Group t/a Musgrave Nursing Home*, (1988) 9 I.L.J. 709, 714 (I.C.). But see the decision in *Karbusicky v. Anglo American Corporation of SA Ltd.*, (1993) 14 I.L.J. 166 (I.C.) that it was not necessary for the employer to consult with the employee before making a decision to retrench, since the decision was taken as a purely commercial one, and the object of consultation should not be to reconsider the commercial aspects of the management decision but rather to consider ways and means to avoid the consequences of the management decision.

¹⁶¹*NUMSA v. Atlantis Diesel Engines (Pty.) Ltd.*, (1993) 14 I.L.J. 642, 650 (L.A.C.).

retrenchments, and have resolved to fight retrenchments which do not relate to genuine economic problems. The media officer of the Congress of South African Trade Unions was quoted as saying: "We are aware of situations where employers simply retrench workers for no apparent reason. They shrink production unnecessarily instead of finding other ways of adjusting."¹⁶² This remark was triggered by a report by a labour research organisation which suggested that South African companies increased dividend payments to shareholders at the expense of jobs.¹⁶³ The explanation given by an employer will not necessarily satisfy workers, nor will the Court perforce agree with the employer's views. After all, the intention behind explanation is not to achieve unanimity. What is intended is that explanation will reduce arbitrariness, will secure an employer's mindfulness in the face of intricate economic factors, and will assure the Court of the legitimacy and validity of an employer's standards.

In a number of recent judgements, the Industrial Court has accepted the argument that prior consultation would not have made any difference. In effect, the Court second-guessed the employer's decision and found that the lack of procedure did not result in any injustice. In one case, the Court considered the employer's evidence that he had to reduce his staff by reason of his financial difficulties and decided that consultation, being of a highly technical nature, was bound not to make any difference.¹⁶⁴ Implicitly, the Court required proof by the employer that he or she would have come to the same decision had the correct procedure been followed,¹⁶⁵ but by obviously requiring a low standard of proof the Court involved itself in an unacceptable degree of guess-work and almost completely denied the value of consultation. A still more insidious attitude was displayed in another case where, instead of requiring proof by the employer that the procedure would have had no effect on the decision, the Court stated that the employee must make out a case, not in the way of onus, but in the sense of an evidentiary burden, that it would have made a

¹⁶²*The Weekly Mail*, March 1 to March 7 1991, quoting Neil Coleman.

¹⁶³The report was released by the Cape Town-based Labour Research Service, 1991. According to the report, the top 100 companies listed on the Johannesburg Stock Exchange increased their dividend payouts by an average of 21,3 percent but only increased employment by 0,1 percent.

¹⁶⁴*CCAWU of SA v. George's Cafe*, Case No NH 11/2/2617 (unreported).

¹⁶⁵See Sandra Fredman & Simon Lee, "Natural Justice for Employees: The Unacceptable Faith of Proceduralism," 15 *Indus. L.J.* 15, 18 (1986).

difference had the guidelines been applied to him.¹⁶⁶ This remark was made without any substantiation and in a fundamental sense denounced the pivotal role of procedural justice in industrial relations.¹⁶⁷ The procedure of consultation provides a degree of protection for employees against the arbitrary use of private managerial power.¹⁶⁸ And, more important, consultation, like collective bargaining, introduces an element of participatory democracy into the workplace and the Court's role is to enforce upon employers the duty to consult with regard to all appropriate subject matters.

In *NUMSA v. Metkor Industries*¹⁶⁹ the Court considered the importance of consultation for employees when it stated:

"I take the view that it is a requirement, that, if it is a consequence that employees' interests shall or even may be affected (and not necessarily only in regard to retrenchment), the employees are entitled to be kept informed, from the earliest possible reasonable time, to the extent that it is reasonably necessary to enable them to consult with management in regard only to such matters as reasonably affect them, at the same time taking into account the lawful, reasonable and fair requirements of management to preserve security."¹⁷⁰

With these statements the Court emphasized the distinct interests of employees who ought to be included in the decision-making process through consultation, prior to the conclusion of any agreement of sale of a commercial undertaking. In this way the Court wanted to ensure that "the agreement of sale reflects as far as possible, insofar as the employees are concerned, what the employees believe to be in their own interests."¹⁷¹ One problem with the decision can be found in the phrase which limited consultation to "such matters as reasonably affect" employees. This limitation begs the question of who is to decide the scope of consultation when employees'

¹⁶⁶*Young v. Lifegro Assurance*, (1990) 11 I.L.J. 1127 (I.C.).

¹⁶⁷*Cf.* the statements of the Court in *NUMSA v. Atlantis Diesel Engines (Pty.) Ltd.*, (1993) 14 I.L.J. 642, 651 (L.A.C.): "The question is not whether consultation ... would have achieved a different outcome. The process of consultation is valuable in itself because it contributes to the realization of the primary aim of the Act, i.e. the preservation of industrial peace ... The so-called 'no difference' principle should, therefore, not find a place in [the] area of [retrenchment]." See also P. Benjamin, "Condoning the Unprocedural Retrenchment: The Rise of the 'No Difference' Principle," 13 *Indus. L.J.* 279 (1992).

¹⁶⁸In *Mohamedy's v. CCAWU of SA*, (1993) 2 L.C.D. 34 (L.A.C.) the Court emphasized the value of consultation to avoid or minimize industrial conflict.

¹⁶⁹*NUMSA v. Metkor Industries*, (1990) 11 I.L.J. 1116 (I.C.).

¹⁷⁰*Id.* at 1123F-H.

¹⁷¹*Id.* at 1124H.

interests cannot be clearly separated from managerial prerogative.¹⁷² There is a clear danger that the aim of participatory democracy will be defeated if management is to be made the sole arbiter of matters falling within the area of consultation.

The fourth requirement regarding retrenchment demands that retrenchment should take place according to reasonable criteria with regard to the selection of employees, including, but not limited to, the ability, capacity, productivity and conduct of those employees. "Reasonable criteria" suggests the use of objective and fair selection criteria.¹⁷³ The most commonly accepted criterion is based on seniority, generally known as "last in, first out" (LIFO),¹⁷⁴ which is determined by taking into account an employee's entire period of service in a business, including the employment with a transferor before the sale of the business to a new owner.¹⁷⁵ Other criteria include attendance records,¹⁷⁶ efficiency and experience.¹⁷⁷ The Court has stressed the need for objectivity. The Court in *Shezi v. Consolidated Frame Cotton Corporation* required "the establishment of criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked...".¹⁷⁸ The object is "to ensure that an employer does not act with improper motive when coming to a decision to retrench".¹⁷⁹

It is submitted that fair selection criteria should be applied within an undertaking, a term which indicates the whole range of an employer's activities provided that there is "some evidence of organizational unity, e.g. common accounting management, purchasing arrangements, insurance."¹⁸⁰ Selection within a wider context was what the Industrial Court had in mind when it condemned the selection

¹⁷²See B. Jordaan, "Transfer, Closure and Insolvency of Undertakings," 12 Indus. L.J. 935, 948 (1991).

¹⁷³M.S.M. Brassey, E. Cameron, M.H. Cheadle & M.P. Olivier, *The New Labour Law* 294-96 (Cape Town 1987) and Edwin Cameron, Halton Cheadle and Clive Thompson, *The New Labour Relations Act* 127-28 (Cape Town 1989).

¹⁷⁴*UAMAWU v. Fodens*, (1983) 4 I.L.J. 212, 230 (I.C.).

¹⁷⁵*CCAWU of SA v. George's Cafe*, Case No. NH 11/2/2617 (unreported).

¹⁷⁶*Shezi v. Consolidated Frame Cotton Corporation*, (1) (1984) 5 I.L.J. 3, 13 (I.C.).

¹⁷⁷*Id.* at 13.

¹⁷⁸*Id.* at 13.

¹⁷⁹*Meyi v. Ovcon*, (1988) 9 I.L.J. 672, 673 (I.C.).

¹⁸⁰*Kapur v. Shields*, [1976] 1 All E.R. 873, 880 (Q.B.).

of applicants at a particular site for retrenchment when there was no investigation of situations at other building sites. The fair selection of employees for retrenchment requires an investigation of the employees' productivity, service record and length of service in comparison to those of other employees in similar positions at other sites.¹⁸¹

A final and ubiquitous requirement with regard to retrenchments introduces the need for good faith and a commercial rationale. Unfortunately, the implications of this requirement to control potential abuse of managerial prerogative, have not been realised in full. While concerns for fairness in public law have prompted the Courts to forge standards of rationality to test the legitimacy of acts of decision-makers, Courts seem much more reluctant in the sphere of employment to hold employers accountable for their decisions. What this requirement entails is a clear showing by the employer that the exercise of power furthered the economic aims of the business and contributed towards efficiency. The employer's authority vests him or her with the burden of proof in this instance, and rationality cannot be presumed.¹⁸² If the criterion of rationality is applied so as to prevent the potential abuse of power, there is no basis upon which the Court can accept a presumption in favour of commercial rationale;¹⁸³ the difficulties in calculating the saving resulting from retrenchment arithmetically should not distract from the important principle which makes it incumbent for the Court to review the rationale for the retrenchment.¹⁸⁴

¹⁸¹*Cele v. Bester Homes*, (1990) 11 I.L.J. 516, 526 (I.C.).

¹⁸²See the statements of the Court in *SACTWU v. Jatex SA (Pty.) Ltd.*, (1992) 13 I.L.J. 1252, 1265-6 (I.C.): "One of the aspects of any decision [to retrench] is to satisfy the employees that the decision was a bona fide one ... [I]f the employee or the union raises some fact or facts from which an inference ... can be drawn [that the decision was not bona fide], it may be necessary for the employer to furnish additional information to allay that suspicion and if it is raised during subsequent proceedings in the industrial Court sufficient evidence will have to be presented to satisfy the evidentiary burden in this regard."

¹⁸³*CSFWU v. Aircondi Refrigeration*, (1990) 11 I.L.J. 532, 546G-I (I.C.). See also *FAWU v. Kellogg SA (Pty.) Ltd.*, (1993) 14 I.L.J. 406, 413 (I.C.): "If [the employer's] decision has a bona fide commercial rationale, though not necessarily sagacious, it will be unassailable." A similar decision was reached in *Mobius Group (Pty.) Ltd. v. Corry*, (1993) 2 L.C.D. 193 (L.A.C.) when the Court held that, because the bona fides of the dismissal was not in issue in this case, the employer was not obliged to motivate its decision: "neither the Industrial Court nor this Court is equipped to decide issues of economic, business and commercial rationale."

¹⁸⁴The Labour Appeal Court in *Seven Abel C.C. t/a The Crest Hotel v. HRWU*, (1990) 11 I.L.J. 504, 508C-I (L.A.C.) pointed out that the savings resulting from retrenchment could not be calculated simply by comparing the direct costs of employing the retrenched workers with, as in this case, the costs of subcontracting the services. See also *Mkhize v. Kingsleigh Lodge*, (1989) 10 I.L.J. 944 (I.C.) for an example of the Industrial Court assessing commercial rationale. In *Ferodo (Pty.) Ltd. v. De Ruiter*, (1993) 2 L.C.D. 284 (L.A.C.) the finding of the Court was that there had been no real commercial rationale for the

(continued...)

Ultimately it should be kept in mind that the quest for rationality is only important because it can contribute towards the fairness of the decision. The Court's function is not merely to determine whether a decision is bona fide and made in a business-like manner, but to adjudicate fairness: "Fairness in this context goes further than bona fides and the commercial justification for the decision to retrench. It is concerned, first and foremost, with the question whether termination of employment is the only reasonable option in the circumstances."¹⁸⁵ The Court has to be convinced that termination of employment for economic or operational reasons, like termination of employment for disciplinary and performance-related reasons, is a measure of last resort.

Severance pay

Severance pay is not listed as a requirement in the definition of an unfair labour practice and has engendered controversy. Underlying the controversy is the question whether there is any proper basis in law or equity upon which the loss suffered by retrenched employees can be recouped from another party. Two possible bases for imposing a requirement to pay severance pay can be distinguished, one arising from contract, and the other flowing from the provisions of the Labour Relations Act.

The first source from which an accrued right to severance pay can emanate, namely a relevant contract, is undisputed. In the face of a de facto assumption of responsibilities for the payment of severance pay, there can be no further question regarding an employer's obligations. As such it can be argued that the matter of severance pay falls within the collective bargaining arena and should be left to employers and trade unions to decide for themselves.¹⁸⁶ A claim for severance pay is regarded as a monetary one which, like a claim for an increase in wages, will depend upon the outcome of the collective bargaining process.¹⁸⁷ In terms of this argument, freedom of contract reigns supreme and there is no basis for judicial

¹⁸⁴(...continued)
employee's retrenchment which had been motivated by an attempt of the employing company to accommodate another employee.

¹⁸⁵*NUMSA v. Atlantis Diesel Engines (Pty.) Ltd.*, (1993) 14 I.L.J. 642, 648 (L.A.C.).

¹⁸⁶Edwin Cameron, Halton Cheadle and Clive Thompson, *The New Labour Relations Act* 128-29 (Cape Town 1989).

¹⁸⁷*Id.* at 103.

intervention.

However, the contractual liberty of an employer to dispense or withhold severance pay is challenged by those who argue that it should be incumbent upon an employer to compensate an employee for the loss of a "proprietary" stake in a job.¹⁸⁸ After all, the South African statute does not recognise a "proprietary" right in a job to the same extent as the English law and comparisons should be made with extreme caution. In the UK, redundancy payments are regulated by statute, specifically with regard to the periods of employment which are required to qualify for compensation, the amount of compensation and the extent to which redundancy payments can be recovered from the state-controlled Redundancy Fund. This context provided the support for the significant statements by Lord Denning in *Lloyd v. Brassey*.¹⁸⁹

"A worker of long standing is now recognised as having accrued rights in his job, his right gains in value over the years. So much so that if the job is shut down he is entitled to compensation for a job - just as a director gets compensation for loss of office. The director gets a golden handshake. The worker gets a redundancy payment. It is not unemployment pay. I repeat "not". Even if he gets another job straight away, he is nevertheless entitled to full redundancy payment. It is in a real sense compensation for long service."

In a different context, these remarks are not necessarily valid and judgements which relied on the English law to argue for accrued job rights in South Africa have been challenged.¹⁹⁰ However, what cannot be ignored are the indications in the Labour Relations Act that practices which prejudice or jeopardise an employee's employment opportunity or work security, or detrimentally affect industrial relations, may be considered unfair. Behind this concern for the relations between employer and employee and the nebulous recognition of accrued rights in a job, an employer's responsibilities become visible and may well include the payment of severance pay. The definition of an unfair labour practice gives recognition to the concerns underlying the idea of severance pay.

The definition of an unfair labour practice formed the basis for the Court's finding in *Cele v. Bester Homes* that the refusal by an employer to pay severance benefits may be considered unfair. The Court stressed the adverse effect of a failure

¹⁸⁸*Id.* at 103-04, referring to *Jacob v. Prebuilt Products (Pty.) Ltd.* (1988) 9 I.L.J. 1100, 1104 (I.C.).

¹⁸⁹*Lloyd v. Brassey*, [1969] 1 All E.R. 382 (C.A.).

¹⁹⁰*Young v. Lifegro Assurance*, (1990) 11 I.L.J. 1127, referring to *Cele v. Bester Homes*, (1990) 11 I.L.J. 516 (I.C.) and *Jacob v. Prebuilt Products (Pty.) Ltd.*, (1988) 9 I.L.J. 1100 (I.C.).

to pay severance pay on the relationship between the employer and its retrenched and retained employees,¹⁹¹ and accepted the submission that "failure to pay severance benefits does unfairly prejudice or unfairly jeopardize the employee's employment opportunity or work security."¹⁹² A serious consideration was the possibility that "employees may perceive the failure to pay severance benefits as unfair and that this could lead to industrial unrest."¹⁹³

An analysis of the purposes of severance pay reveals a concern for secure employment,¹⁹⁴ and the payment of severance money is by and large regarded as good industrial relations practice in no-fault retrenchment situations. The usual practice which has been followed by "enlightened employers in this country"¹⁹⁵ is to offer employees severance pay of one or two weeks' pay calculated at the date of dismissal for every completed year of service. In *Cele v. Bester Homes*¹⁹⁶ in response to a submission that severance pay should be the subject of negotiation at industrial council level, the Court ruled:

"This would naturally be desirable and would set standards for the industry in respect of severance benefits. Until such time that (sic) the industrial council lays down minimum payments, if at all, employees adversely affected by the current recession in the industry can only demand payment of severance benefits by approaching this [C]ourt for assistance. (And similarly) [t]he quantum [of severance pay] should be left to free and fair collective bargaining, but in the absence of that this [C]ourt will have to determine the

¹⁹¹*Cele v. Bester Homes*, (1990) 11 I.L.J. 516, 528 (I.C.).

¹⁹²*Id.* at 527.

¹⁹³*Id.* at 530.

¹⁹⁴*But cf. Young v. Lifegro Assurance*, (1990) 11 I.L.J. 1127 (I.C.) for the argument that an employee has no vested right in a job. Underlying the argument is the claim that such a right would require that an employee be compensated for any kind of job loss, including constructive dismissal, or even for incidents of short time or lay-off where such a "proprietary" right must necessarily be severely eroded. This is not the case. Moreover, in terms of the contract of employment, an employer incurs no liability for compensation for "loss of job" by the employee, as long as the dismissal took place in accordance with the precepts of the law and in a fair manner.

¹⁹⁵*Ntuli v. Hazelmere Group t/a Musgrave Nursing Home*, (1988) 9 I.L.J. 709, 718-19 (I.C.). It has never been suggested that a practice which is recognised to be conducive for sound industrial relations need to adhere to the standards which are used to determine when a custom becomes law, such as the requisites that such a custom must be reasonable, be long established, be uniformly observed and be certain (*Voet* 1.3.28,29,31,33; *Van Breda v. Jacobs*, 1921 A.D. 330; and see *Young v. Lifegro Assurance*, (1990) 11 I.L.J. 1127 (I.C.)). Good industrial relations operate within a sphere not purely determined by legal factors, in which adaptability and elasticity is of great importance.

¹⁹⁶(1990) 11 I.L.J. 516 (I.C.).

question of severance benefits payable.¹⁹⁷

Judicial intervention to set minimum standards for collective agreements can create a climate conducive to future collective bargaining on severance benefits,¹⁹⁸ especially since the standards which the Industrial Court has posited have a wide application and are not restricted to particular industries or geographical areas. The Court has declared itself in favour of looking at "the general practice in the country and the total economy."¹⁹⁹

The most important purpose of severance pay remains the compensation for the expropriation of an employee's job,²⁰⁰ and not principally "to smooth out the disruption in the circumstances of the affected employee as much as possible",²⁰¹ or "to tide him over while he looks for other employment."²⁰² This kind of damage suffered by retrenched employees, should ideally be guarded against by insurance.²⁰³ In South Africa the state has always shunned responsibilities in this regard, as is evident from the inadequacy of unemployment insurance. Similarly, the state has never borne any portion of the cost of compensation for the loss of an employee's job. In the absence of state involvement, there is no justification for heaping the entire burden suffered by a retrenched employee who loses a job without contributory fault, the employee.²⁰⁴ A sharing of the burden between employer and employee is

¹⁹⁷*Cele v. Bester Homes*, (1990) 11 I.L.J. 516, 530 (I.C.). See also *Imperial Cold Storage & Supply Co. Ltd. v. Field*, (1993) 14 I.L.J. 1221, 1228 (L.A.C.): "[T]here is no reason why an employer might not, for the ... reason of cushioning the blow of a no-fault retrenchment, be required in particular circumstances to pay a fair retrenchment package. If the employer does not do so, his conduct may amount to an unfair labour practice."

¹⁹⁸See Andrew Breitenbach, "Aspects of the South African Law on Retrenchment in the Light of English Labour Standards," 11 *Indus. L.J.* 1193, 1213 n. 118 (1990).

¹⁹⁹*Cele v. Bester Homes*, (1990) 11 I.L.J. 516, 529 (I.C.).

²⁰⁰This is also the view taken by N.F. Rautenbach in his note "In Search of the Severance Package," 12 *Indus. L.J.* 735, 737 (1991).

²⁰¹*Young v. Lifegro Assurance*, (1990) 11 I.L.J. 1127 (I.C.).

²⁰²*E.M. Mdalose v. B.A.C. Services C.C.*, NHN 11/2/1603 (unreported); see also *CCAWU of SA v. Status Hotel*, (1990) 11 I.L.J. 167, 171 (I.C.); *Hlongwane v. Plastix (Pty.) Ltd.*, (1990) 11 I.L.J. 171 (I.C.).

²⁰³*Young v. Lifegro Assurance*, (1990) 11 I.L.J. 1127 (I.C.).

²⁰⁴N.F. Rautenbach, "In Search of the Severance Package," 12 *Indus. L.J.* 735, 743-4 (1991) describes the employer's advantage and the rationale for compensating an employee for losses caused by termination as follows: "One feels instinctively that ... while the employer gains the commercial advantage of being able to make increased profits, or cut costs, or avoid insolvency; the employee does not gain. Intuitively one senses that employee feelings of outrage are caused by the loss incurred in circumstances where the

(continued...)

justified where both enjoyed the benefits of the relationship, with the employer almost always getting the greater financial benefit from it. On this basis it is submitted that, regardless of whether a retrenchment is procedurally fair or unfair, severance benefits should be payable on retrenchment.²⁰⁵ In addition, in cases of unfair retrenchment where the unfairness causes damage, the employer may be liable for compensation. Unfairness will of course be determined with regard to all the circumstances of the retrenchment and a claim for compensation will not necessarily be appropriate if, for example, after proper consultation with all concerned, the employer assists the affected employee in finding an adequate equivalent job, be it with the employer's successor, or elsewhere.²⁰⁶

A caveat: the denial of a claim in circumstances where an employee has been offered alternative employment should never be a routine exercise, for two main reasons. One reason has to do with the meaning of the concept "suitable alternative employment," the other with the procedure which precedes such an offer. With regard to the meaning of the words "suitable alternative employment," the Court has pointed out that the employment should be "suitable" to both the employer and employee.²⁰⁷ To this it has added that "suitable" connotes flexibility and that employment therefore does not have to be "identical" or "similar;" nor does it have to be "equivalent or better." The Court has to follow a flexible approach when it considers all the facts and circumstances pertaining to a particular situation and person.²⁰⁸ However, the flexibility with which the concept of alternative employment has to be approached, does not detract from the importance of demanding adherence to procedural standards, and a lack of consultation should be enough reason for the Court to

²⁰⁴(...continued)

employer gains commercially ... In the abstract, severance pay balances the commercial rationale of the employer against the loss of the employee."

²⁰⁵See, e.g., *TGWU v. Action Machine Moving & Warehousing (Pty.) Ltd.*, (1992) 13 I.L.J. 646, 653-4 (I.C.). N.F. Rautenbach, "In Search of the Severance Package," 12 Indus. L.J. 735, 745 (1991) proposes that the Court can interfere with the amount awarded by the employer by using an objective standard: "The [C]ourt must be satisfied, at least, that the employee has been treated unfairly from an objective point of view in the sense of the effect or impact which the severance pay, or the manner in which it has been calculated or paid over, has on the employee."

²⁰⁶*Young v. Lifegro Assurance*, (1990) 11 I.L.J. 1127 (I.C.).

²⁰⁷*Stellenbosch Farmers' Winery (Pty.) Ltd. v. National Union of Wine, Spirits & Allied Workers*, (1992) 13 I.L.J. 1182, 1186 (L.A.C.).

²⁰⁸*Id.* at 1187.

proceed with great caution before denying a claim for compensation, particularly in a business transfer situation.²⁰⁹ It has been pointed out above that the common law makes it difficult to avoid termination of the employment contract when a business is transferred; important issues for employees therefore concern the compensation and benefits due to them in such an event. A Court will often be confronted with the question whether employees should be entitled to retrenchment benefits regardless of whether the transferee makes an offer of re-employment on substantially the same terms and conditions of employment as before. Alternatively, should employees be entitled to compensation if they elect not to be transferred and prefer that their services be terminated? The emphasis which the common law places on an employee's freedom of choice suggests that an employee should have all the benefits accompanying this freedom. And yet, when the employee exercised his freedom of choice in the *Lifegro* case and refused the offer of re-employment, he did not get the severance package offered to other employees. Similarly, the Court in *Ntuli* stated that employees will not be entitled to compensation if they refuse an offer of employment on substantially the same terms and conditions as their previous employment, with "due regard to the existing service and other benefits."²¹⁰ The Court's conclusions in these two cases might have been correct, but the approach of the Court can be criticised. In terms of the tenets of the common law, priority should be given to affording an employee a fair choice, which also means following the correct procedures. Only after these concerns have been stressed, can the Court give consideration to the content of the offer of re-employment and the status of the employer, and make a finding that the circumstances were so exceptional that an employee who declines an offer of re-employment should not be entitled to compensation or benefits. This approach was basically followed by the Court in *Jacob v. Prebuilt Products*²¹¹ when it postulated a general rule that employees are entitled to compensation simply because of a change in the status of the employer, regardless

²⁰⁹The requirement of consultation was not even mentioned in *Memela v. Super-Care Cleaning (Pty.) Ltd.*, (1992) 13 I.L.J. 172 (I.C.), a case which concerned employees in the service industry who was "taken over" by a new contractor when their erstwhile employer lost its contract. Although their new employment was not significantly different from their previous employment, they were no longer paid a long service benefit, which they claimed from their first employer in the form of severance pay. Consultation was all the more important since the Court did mention that efforts to establish an industrial council had failed.

²¹⁰*Ntuli v. Hazelmere Group t/a Musgrave Nursing Home*, (1988) 9 I.L.J. 709, 719G-H (I.C.). See also *Anderson v. Foseco (Pty.) Ltd.*, (1993) 2 L.C.D. 40 (I.C.).

²¹¹*Jacob v. Prebuilt Products (Pty.) Ltd.*, (1988) 9 I.L.J. 1100 (I.C.).

of the content of the offer of re-employment. Although the judgement might have been too rigid in that it did not allow for any exceptions, it respected the limited right to a job which the common law grants to employees.

Consultation about effects

The formal distinction between decision- and effects-bargaining, which has been accepted by the American judiciary, has not been established in South African cases. However, in applying the requirement of consultation in the event of business transfers, the Industrial Court in a few cases has separated the decision from the effects of the decision.²¹² Although there is a lack of consistency, the Court has in these cases followed a two step analysis.

First, in deciding whether a retrenchment is fair, the Court enquires into the reasons or the underlying motive for the employer's decision and regards it as important that an employer acts fairly in its relationship with employees.²¹³ An unfair labour practice was found in a case where the Court came to the conclusion that the employer's real reason for retrenchment was one of ridding itself of a particular union and its members actively involved in union activities.²¹⁴ Similarly, the Court regarded it as unfair where it found that the closure of one company and the opening of a second company was used as a stratagem to get rid of a portion of the work-force so as to avoid compliance with fair employment and bargaining practices.²¹⁵

The Court has accepted that employees cannot force an employer to remain in operation if an employer decides bona fide that it is not an economically viable proposition to do so.²¹⁶ For this reason, a decision which the Court regarded as being based on economic reasons, was accepted as a prerogative of management, without careful questioning or scrutiny of the validity or relevance of the arguments or

²¹²See, in general, Paul Benjamin, "Condoning the Unprocedural Retrenchment: The Rise of the 'No Difference' Principle," 13 Indus. L.J. 279 (1992).

²¹³*Paper, Printing, Wood & Allied Workers Union v. Kaycraft (Pty.) Ltd.*, (1989) 10 I.L.J. 272, 280 (I.C.), quoting *NUTW v. Braitex (Pty.) Ltd.*, (1987) 8 I.L.J. 794, 799 (I.C.).

²¹⁴*Simelane v. Audell Metal Products (Pty.) Ltd.*, (1987) 8 I.L.J. 438 (I.C.).

²¹⁵*SACWU v. Toilet Pak Manufacturers (Pty.) Ltd.*, (1988) 9 I.L.J. 295 (I.C.).

²¹⁶*Paper, Printing, Wood & Allied Workers Union v. Kaycraft (Pty.) Ltd.*, (1989) 10 I.L.J. 272, 280 (I.C.). See also *Karbusicky v. Anglo American Corporation of SA Ltd.*, (1993) 14 I.L.J. 166 (I.C.); *SA Municipal Workers Union v. Ibhayi City Council*, (1993) 2 L.C.D. 94 (I.C.); *CWIU v. Sopellog*, (1993) 2 L.C.D. 45 (I.C.); *Durban Integrated Municipal Employees Society v. Tongaat Town Board*, (1993) 2 L.C.D. 54 (I.C.).

values supporting the decision. The Court did not show any concern for the dialectical aspect of the decision-making process. To the same extent as in the United States, an employer's stated reason for its decision determined the question of negotiation or consultation. The Court stated that "ordinary business logic" suggested that a decision to close was one of policy and therefore a function of management. It explained the duty to manage as follows:

"[I]t is management which has its hands on the controls and its eyes on the instrument panel, so to speak. Logically, it is for management to react to what the instruments show."²¹⁷

In another case "managerial prerogative" was regarded to concern any matter "relating to an area in which, because of its particular knowledge, expertise and interest, an employer is peculiarly qualified to make a unilateral decision".²¹⁸

The analysis proceeds to a second stage in cases where the Court regards the decision itself to be based upon commercial expediency and therefore a function of management. In these circumstances the Court, while freeing management from the requirement of consultation with regard to the decision, requires consultation concerning the effects.²¹⁹

It is submitted that the inception of the distinction between consultation over a decision to terminate the employment of employees and the effects of such a decision, is not only unwarranted by the statutory requirement of prior consultation but is also contrary to the way in which the Courts have interpreted this requirement. It has been reiterated many times that unilateral action taken by an employer is to be condemned because of its adverse effect on the employment relationship and its potential to create labour unrest.²²⁰ The better attitude is reflected in the majority of decisions of the Industrial Court which have accepted that consultation should concern

²¹⁷*TGWU v. Putco*, (1987) 8 I.L.J. 801, 806 (I.C.).

²¹⁸*Amalgamated Clothing & Textile Workers Union of SA v. SBH Cotton Mills (Pty.) Ltd.*, (1988) 9 I.L.J. 1026, 1031 (I.C.).

²¹⁹*TGWU v. Putco*, (1987) 8 I.L.J. 801, 807-08 (I.C.).

²²⁰See, e.g., *Bleazard v. Argus Printing & Publishing Co. Ltd.*, (1983) 4 I.L.J. 60, 61 (I.C.); *GWU v. Scottford Mills (Pty.) Ltd.*, (1986) 7 I.L.J. 45, 53 (I.C.); *UAMAWU v. Fodens*, (1983) 4 I.L.J. 212 (I.C.); *MAWU v. Transvaal Pressed Nuts, Bolts & Rivets (Pty.) Ltd.*, (1986) 7 I.L.J. 703 (I.C.); *BCAWU v. Masterbilt C.C.*, (1987) 8 I.L.J. 670, 679 (I.C.); *Ntsaba v. Eastern Province Textiles (Pty.) Ltd.*, (1987) 8 I.L.J. 470, 474 and 478 (I.C.).

changes contemplated by an employer as well as the effects of such changes.²²¹ In *Kebeeni v. Cementile Products (Ciskei) (Pty.) Ltd.*²²² the Court stated that consultations ought to be in conformity with the spirit of the norms laid down by the International Labour Organization, in particular Recommendation 166 sec. 20(1), which reads as follows:

"When the employer contemplates the introduction of major changes in production programme, organisation, structure or technology that are likely to entail terminations, the employer should consult the workers' representatives concerned as early as possible on, inter alia, the introduction of such changes, the effects they are likely to have and the measures for averting or mitigating the adverse effects of such changes."²²³

International standards require not only consultation with regard to the effects of business changes but also to the introduction of such changes.

Disclosure

It follows from the duty to consult that the necessary information should be provided to ensure proper consultation.²²⁴ With regard to retrenchment, information should concern matters such as the reasons for the retrenchment, the number and category of workers likely to be affected and the proposed timetable for retrenchment. In *Kebeeni v. Cementile Products (Ciskei) (Pty.) Ltd.* the Industrial Court held that an employer's neglect to disclose relevant and necessary information constituted a failure "to observe the essential canons of fair play". The Court stated that "parties which hide relevant information from the other party with the desire to deceive, prolong negotiations or keep the other party ignorant with the intention to weaken that party, are not acting in the interests of good industrial relations".²²⁵

A poignant statement with regard to the disclosure of information was made

²²¹See, e.g., *NUMSA v. Atlantis Diesel Engines (Pty.) Ltd.*, (1993) 14 I.L.J. 642, 648 (L.A.C.): "Although the notion of a two-stage process may be useful to describe the way in which a retrenchment exercise generally unfolds in practice ... there can be no clear dividing line between the decision to retrench and the implementation of that decision ... [T]he whole of the retrenchment exercise must be fair..."

²²²*Kebeeni v. Cementile Products (Ciskei) (Pty.) Ltd.*, (1987) 8 I.L.J. 442, 449 (I.C.).

²²³ILO Recommendation No. 166, 1982 on Termination of Employment (Consultations on Major Changes in the Undertaking).

²²⁴The Court stated in *NUMSA v. Atlantis Diesel Engines (Pty.) Ltd.*, (1993) 14 I.L.J. 642, 651-2 (L.A.C.): "It is undoubtedly so that meaningful consultations about ways of avoiding or minimizing the impact of retrenchment can only occur if the trade union is provided with the necessary information ... Sufficient information must be disclosed to make the process of consultation meaningful."

²²⁵*Kebeeni v. Cementile Products (Ciskei) (Pty.) Ltd.*, (1987) 8 I.L.J. 442, 450 (I.C.).

in *Hadebe v. Romatex Industrials Ltd.*:²²⁶

"The tendency of employers simply to ascribe their plight to the general economic problems of the country at any given time, is to be deprecated because there is no way of knowing how prevailing economic conditions have affected a particular employer's business, unless he is prepared to make full disclosure of his state of affairs to the other interested parties."

To this the Court in *McLaughlin v. GKN Mills* added that "in the absence of such budgetary details, it is not possible for the [C]ourt to conclude that the applicant's retrenchment was in fact unavoidable."²²⁷

The extent to which disclosure has to be made is not subject to hard and fast rules, but depends on a careful balancing of the conflicting interests of the parties. In *NUMSA v. Metkor Industries*²²⁸ the Court interpreted the requirement of disclosure so as to allow for management's interest in two ways. First, it was considered just and equitable that management should "disclose only such information as would reasonably enable employees to consider the consequences that that information held for them." The Court did not consider it an unreasonable expectation that management should have sufficient acumen to enable it to make a decision as to the extent of disclosure to its employees and a balance was struck on this basis. Second, where a transaction requires a high degree of security, the Court foresaw the possibility that an employer could obtain an undertaking of secrecy before consulting with a union.

An employer's licence to refuse disclosure was qualified in *National Union of Metalworkers of SA v. Atlantis Diesel Engines (Pty.) Ltd.*,²²⁹ a well-reasoned and comprehensive judgement. Although the Court allowed for certain grounds on which an employer can refuse to disclose information -- availability, relevance, confidentiality - it placed the onus on the employer to show that requested information is either not relevant to avoiding or minimizing the impact of the retrenchment, or harmful to its business interests.²³⁰ In the latter case, the employer, together with the union should actively investigate ways of making the information available in such a way that

²²⁶*Hadebe v. Romatex Industrials Ltd.*, (1986) 7 I.L.J. 726, 737 (I.C.).

²²⁷*McLaughlin v. GKN Mills*, (1986) 7 I.L.J. 721, 724-25 (I.C.).

²²⁸*NUMSA v. Metkor Industries*, (1990) 11 I.L.J. 1116 (I.C.).

²²⁹*NUMSA v. Atlantis Diesel Engines (Pty.) Ltd.*, (1993) 14 I.L.J. 642, 652 (L.A.C.).

²³⁰See also *Burmeister v. Crusader Life Assurance Corporation Ltd.*, (1993) 14 I.L.J. 1504, 1509 (I.C.) in which the Court found that, since its area of concern was labour relations and the employment relationship, it did not have to take into account the personal interests of shareholders, policy holders and directors or any other third parties unless it could be successfully contended that their interests were such as to affect the Court's obligation to do what was fair to the employer.

it excludes or minimizes the risk of harm.²³¹

Proactive conduct by the union

Collective bargaining agreements may be concluded by parties to an industrial council or a conciliation board, or more informally between employers, on the one hand, and trade unions or employees, on the other. The last mentioned agreements include recognition agreements and agreed disciplinary, retrenchment and dispute procedures.²³² Accordingly, agreements which are the product of intentional and considered negotiation between the parties will be enforced by the Courts.²³³ The Industrial Court will, however, make sure that an agreement was deliberately intended by both parties to regulate a specific event such as the severance of the employment relationship.²³⁴ The Court has had the opportunity to pronounce on the effects of a sale upon a valid recognition agreement in *NUMSA v. Metkor Industries (Pty.) Ltd.*²³⁵ In such a situation, normal contractual principles apply. According to the Court, if there is a termination of employment as a result of a sale, a recognition agreement will not fall away, at least not insofar as any provisions for termination are concerned; such provisions remain in esse until such time as they have been complied with or otherwise lawfully been disposed of.

An agreement concluded between a transferee and the transferor or a trade union may bind the transferee to offer employment to the employees, and in this way may limit the transferee's freedom to choose which of the employees will be engaged in the acquired undertaking,²³⁶ or to vary the terms of employment.²³⁷ There is,

²³¹*NUMSA v. Atlantis Diesel Engines (Pty.) Ltd.*, (1993) 14 I.L.J. 642, 652 (L.A.C.).

²³²Edwin Cameron, Halton Cheadle and Clive Thompson, *The New Labour Relations Act 134* (Cape Town 1989).

²³³Assuming the ordinary requirements of the law of contract have been met.

²³⁴See, e.g., *BCAWU v. Masterbilt C.C.*, (1987) 8 I.L.J. 670, 677 (I.C.) ("It can safely be said that should a retrenchment agreement be deficient in some respect, i.e. not provide for a certain situation, this Court will be obliged to seek the applicable rule elsewhere...").

²³⁵*NUMSA v. Metkor Industries (Pty.) Ltd.*, (1990) 11 I.L.J. 1116 (I.C.).

²³⁶*Ntuli v. Hazelmere Group t/a Musgrave Nursing Home*, (1988) 9 I.L.J. 709, 713 (I.C.) and *Lathe v. Impala Holiday Flats*, (1993) 14 I.L.J. 1074, 1080 (I.C.). But cf. the implications of *Borg-Warner SA v. NAAWU*, (1991) 12 I.L.J. 549 (L.A.C.) (failure to abide not an unfair labour practice).

however, no obligation to come to such an agreement and it is unlikely that a transferee will easily enter into an agreement with a trade union which will limit the wide ranging choices which the common law confers upon a new employer in a business transfer situation. The possibility of an agreement between transferor and transferee is more likely, since this could be reflected in the price which the transferee has to pay to acquire an undertaking. They can, for example, agree to displace the burden of the responsibility towards employees by way of an indemnity or otherwise.²³⁸

Considering the serious legal consequences which an employee will usually have to face in transfer situations, the Court has suggested in several cases that the transferor is under some kind of obligation to negotiate the fate of the work-force with the transferee. In one case, the Court made a vague suggestion, on the basis of the British Transfer of Undertakings Protection of Employment Regulations of 1981, regarding the existence of some kind of obligation to incorporate safeguards into an agreement between the parties in the following passage:

"If it is intended to transfer the undertaking and/or its major assets such as plant and machinery of the employer (transferor) to another party (transferee), safeguards should be incorporated into the agreement between the parties to ensure that the interests of the work-force are adequately protected. One of the safeguard clauses could for example be that all existing contracts of employment would be deemed to have been transferred to the new employer who would be obliged to retain all existing employees without discrimination, save that an individual employee may have the option not to continue his employment relationship with the transferee."²³⁹

These remarks were, however, of no consequence in this case which, in fact, dealt with the usual situation where an employer retrenched employees. The transferor was held liable for the unfair retrenchment of the employees and no responsibility was attached to the new proprietor as no employment relationship had existed between it and the dismissed employees.

The lack of agreement between transferor and transferee concerning the fate of the work-force, in addition to a lack of consultation with the employees, formed the basis of the Court's finding that the employer had committed an unfair labour practice

²³⁷(...continued)

²³⁷*Ward v. Sentrachem Ltd.*, (1992) 13 I.L.J. 252 (I.C.). The Court found that there was a delegation of the employment contract from seller to purchaser with the employee's consent. This novation of a particular kind imposed upon the purchaser an obligation to procure or provide the benefits to which the employee was entitled in terms of the contract.

²³⁸*Ntuli v. Hazelmere Group t/a Musgrave Nursing Home*, (1988) 9 I.L.J. 709, 721 (I.C.).

²³⁹*Kebeni v. Cementile Products (Ciskei) (Pty.) Ltd.*, (1987) 8 I.L.J. 442, 450 (I.C.).

in *Hoogenoeg Andolusite (Pty.) Ltd. v. NUM (1)*.²⁴⁰ Similarly, in *SACCAWU v. Checkers SA Ltd.*,²⁴¹ the failure of a seller of a business to obtain a firm commitment from the new owners regarding the continuity of employment of the employees was taken into account when the Court granted an interdict²⁴² to enable the parties to exhaust the consultative process. From these cases it appears that, much as the Court would like to come to the aid of employees who are treated unfairly and are seriously prejudiced by a transfer, it cannot force the seller of a business to come to an agreement with the purchaser, and the relief in the end relates to the process of consultation with the employees. In terms of current South African law, employees have no legitimate rights as regards continuation of employment; only as regards consultation. A fair procedure is all that employees can claim.

The lack of substantive protection perhaps explains the weight which the Court at times attaches to procedural fairness. The case of *NUMSA v. Metkor Industries*²⁴³ concerned an agreement between a transferor and transferee which provided that the purchaser would recognise the union and offer employment to sixty percent of the employees of the transferor, on wages similar to those which had been paid by the transferor. Moreover, in the event of retrenchment, the purchaser undertook to comply with certain provisions of the agreement of sale, including those relating to retrenchment. In the case of monthly paid workers, there was an undertaking from the purchaser to the seller that the pension fund payments would, upon retrenchment, be the same as they had been under the seller's pension fund. When the union complained about the lack of consultation prior to the disposal of the business, the seller argued that it had secured certain rights for some employees which were in a very real sense more beneficial than would have been the case had there simply been a negotiation of a severance package and retrenchment. The Court refused to accept

²⁴⁰*Hoogenoeg Andolusite (Pty.) Ltd. v. NUM (1)*, (1992) 13 I.L.J. 87, 93-4 (L.A.C.).

²⁴¹*SACCAWU v. Checkers SA Ltd.*, (1992) 13 I.L.J. 411 (I.C.).

²⁴²In terms of sec. 17(11)(a) of the Labour Relations Act 28 of 1956.

²⁴³*NUMSA v. Metkor Industries*, (1990) 11 I.L.J. 1116 (I.C.). See also *Lathe v. Impala Holiday Flats*, (1993) 14 I.L.J. 1074 (I.C.) for an agreement between a transferor and transferee containing a "staff clause." Because the employees were not party to the sale agreement, nor did they know of its contents, the Court found that the staff clause was not a stipulation for their benefit which they knew about and accepted. They could not rely on the transferee's obligations towards the transferor under the staff clause. The Court suggested, however, that had the employees been party to the agreement, there would have been no difficulty about securing a staff clause which secured continuity of employment for the employees by way of a delegation of rights and obligations.

the argument, observing that the approach pre-supposed the legality and fairness of the conduct of the transferor vis-a-vis the employees from its initiation, and concluded significantly that

"the benefits that employees might have obtained cannot be compared with or linked in any way to the employee's right to be heard in his own interests, even if in the final result he achieves less than otherwise would have been the case."

Although this passage recognises the disadvantages which could result from a situation in which employees are simply presented with a *fait accompli*, compared to the advantages of the consultation procedure in the employment context, especially if this is genuinely applied as an aspect of participatory democracy, it does not provide a complete solution to the plight of employees upon a business transfer. Without legislative intervention to ensure the proper balance between substantive and procedural rights in a business transfer situation, one can expect the Courts to lean towards proceduralism in their struggle to find a basis on which to ensure that fairness is achieved.

Controversy surrounds the question whether the Court will enforce an agreement which does not measure up to the statutory requirements or the Court's standards of fairness. Such requirements or standards will generally prevail in the absence of an agreement. In some cases the Court has regarded it of the utmost importance to give effect to the rules of a procedural agreement in order to foster the concept of collective bargaining and the related concept of self-government.²⁴⁴ It has regarded the agreement as the foundation of the relationship between the employer and employees and has stated that "within a certain closed community ... the rules made between the employer and organised labour are regarded as having binding authority".²⁴⁵ Under this approach, the Court will only intervene if the agreement shows some defect. For example, should an agreement not provide for a certain situation which arises, the Court will be obliged to seek the applicable rule elsewhere.

The strict approach to the enforcement of agreements just outlined, permits employers to bargain for an agreement which allows them unlimited freedom and

²⁴⁴*BCAWU v. Masterbilt C.C.*, (1987) 8 I.L.J. 670, 677 (I.C.).

²⁴⁵*Id.* at 677. See also *TGWU v. Putco Ltd.*, (1987) 8 I.L.J. 801 (I.C.) ("The company had complied with its obligations in terms of the agreement. The closure of the division and the retrenchment of the employees accordingly did not constitute an unfair labour practice").

leaves the employees "in no better state than they were without it".²⁴⁶ What is even more disturbing is the restrictive way in which the Court has interpreted a clause contained in a collective agreement. In *Amalgamated Clothing & Textile Workers Union of SA v. SBH Cotton Mills (Pty.) Ltd.*²⁴⁷ the recognition agreement between the parties contained a statement to the effect that the company recognised the union as the collective bargaining representative and undertook to negotiate with it in good faith.²⁴⁸ The union's contention that the statement implied that the employer was bound to negotiate with the union on all matters affecting the terms and conditions of employment of the employees and any matter of mutual interest to the employer and its employees, was rejected by the Court. In the Court's view, the question whether the employer was under a duty to negotiate was a matter to be determined with due regard to prevailing considerations of law and/or equity, in the light of the specific facts pertinent to the dispute in issue.²⁴⁹ The Court concluded that in accordance with "the dictates of equity", the employer's temporary closures of its premises fell within the ambit of management's prerogative about which there was no duty to negotiate. The disturbing breadth of the Court's holding is that where the statute does not specifically require negotiation, an employer will be able to renege on an undertaking to negotiate. On the other hand, even if the statute provides for specific employee rights, the Court has been willing to ignore these rights, where the contract between the parties was struck at a lower level of protection for employees.

There can be no doubt that the statute has extended certain rights to employees. Considering these rights and the overriding concern of the statute for "fairness", the better approach seems to be to regard agreed criteria as *prima facie* fair.²⁵⁰ Under this approach, the Court has indicated that it will give effect to an agreement unless it conflicts with the accepted principles of fairness.²⁵¹ Far from

²⁴⁶See the American case of *White v. NLRB*, 255 F.2d 564 (5th Cir. 1958) with regard to management rights clauses.

²⁴⁷*Amalgamated Clothing & Textile Workers Union of SA v. SBH Cotton Mills (Pty.) Ltd.*, (1988) 9 I.L.J. 1026 (I.C.).

²⁴⁸*Id.* at 1029.

²⁴⁹*Id.* at 1031.

²⁵⁰Edwin Cameron, Halton Cheadle and Clive Thompson, *The New Labour Relations Act* 128 (Cape Town 1989).

²⁵¹*NUMSA v. Steeleedale Reinforcing and Trading Co.*, (1988) 9 I.L.J. 674, 677 (I.C.).

subverting the collective bargaining process, intervention by the Court in this manner actually promotes it and may effectively redress a skewed collective bargaining relationship. Furthermore, industrial peace may be promoted by the creation of uniform standards of employee protection which correspond to accepted principles of labour relations.²⁵²

Conclusion

When a decision is made to transfer a business, sometimes in conjunction with other strategic business decisions such as a closure or insolvency, the multifarious repercussions which flow from the managerial centre of decision-making can be measured in terms of their legal consequences. The particularly harsh results which such decisions have for employees, create the impression that legal regulation is inadequate.²⁵³ The central position of the contract of employment²⁵⁴ and its continued relevance in modern labour law is very clear from the way in which South African law deals with business transfers. This area of the law is ruled by a variant of the doctrine of automatic determination which defends the inalienable right of an employee to choose an employer, and which was developed originally to protect the employee from being assigned to an obsolete position of serfdom. The important protective function of the common law is clearly outweighed by the hardships which it causes for most employees who are confronted by business transfers. The common law, although ostensibly concerned with the protection of employees' rights, ignores the substance of acquired rights and only protects their freedom to choose an employer. The common law also provides little in the way of express procedural safeguards for employees and allows the unfettered exercise of managerial discretion. The dilemma of employees caught in the turmoil of business changes, evinces the inherent tension between the interests of management and labour for which the common law has not been able to work out a solution. It can be argued that the constraints of the common law make it impracticable to restate the South African

²⁵²Andrew Breitenbach, "Aspects of the South African Law on Retrenchment in the Light of English Labour Standards," 11 *Indus. L.J.* 1193, 1203 (1990).

²⁵³See the remarks which the Court made in *Lathe v. Impala Holiday Flats*, (1993) 14 *I.L.J.* 1074, 1082 (I.C.): "I find that whichever way it is approached, the matter [of a business transfer] produces some sort of conundrum which is prima facie insoluble."

²⁵⁴See M.R.Freedland, *The Contract of Employment* 1 (Oxford 1976).

common law position so as to vest the employee with more rights.²⁵⁵

A key to resolving the stress is more likely to be found in the unfair labour practice definition with its overt concern for fairness. The unfair labour practice jurisdiction in South Africa has changed the substance of labour relations and has introduced restraints on the ability of management to make decisions and implement them regardless of the detrimental effects on employees. And yet, the radical changes which the law has introduced, have not allowed for the protection of acquired rights of employees in the case of business transfers. In part this can be ascribed to the fact that the interpretation of the unfair labour practice concept by the judiciary has always been subjective and unsystematic. But the main reason for the failure of the statutory unfair labour practice jurisdiction is not the result of a simple oversight by a generally conservative judiciary, but is due to a more fundamental misunderstanding of the role of the Courts in supervising the abusive exercise of managerial discretion. The concept of fairness has given the Courts an invaluable tool with which to evaluate the acts of management in the interests of industrial society, but changing structures and patterns in industry demand a constant reinterpretation of the value of fairness, to the same extent that this occurs in political debate. This process is inherently threatening to all parties involved in the labour relationship if the axioms and precepts are not clear. For this reason, the established principles which should direct behaviour and guide judicial interpretation in the area of business transfers should ideally be incorporated in legislation.

General reform which sets out the principles and deals with all the main problems in a precise manner, can probably only be realised through legislation. An examination of the model of EC Directives which have been implemented in the United Kingdom, and which provide a standard for estimating the effects of statutory reform, can help this process.

²⁵⁵Even given its own premises and considering the demise of the doctrine of automatic determination through judicial interpretation, (see, e.g., *Stewart Wrightson (Pty.) Ltd. v. Thorpe*, 1977 (2) S.A. 943 (A.D.); *NUTW v. Stag Packings (Pty.) Ltd.*, 1982 (4) S.A. 151 (T.)) it does not seem likely that the common law position could be restated so as to accommodate the employee's wider interests. There are no compelling reasons to cling to the theory of the contract of employment and to encourage its development in time to keep pace with future demands (see M.R. Freedland, "The Obligation to Work and to Pay for Work," *Current Legal Probs.* 175, 186-8 (1977)), and it seems preferable to accept that the contract of employment is incapable of regulating the modern employment relationship adequately (see, e.g. Lord Wedderburn, *The Worker and the Law* 843 (3d ed. London 1986).)

CHAPTER 5

CONCLUSION

The aim of corporate restructuring is normally the enhancement of the value of shareholders' equity, but the achievement of this aim frequently places considerable pressure on the labour market. The brisk winds of an unregulated marketplace leave employees suffering the consequences of management strategies aimed at cutting the costs of production (including wages and benefits) and, when management effects mass dismissals, enduring the experience of being regarded as surplus labour. This study of the way in which three countries deal with the phenomenon of business transfers and attendant business changes makes several general claims of which two are fundamental. The first is that there is a conflict between the economic demands for restructuring and rationalisation, and the social demands for workers' protection. The second claim concerns the failure of the traditional voluntarist model of collective bargaining to strike a satisfactory balance between workers' demands and management control.

Based on these claims, the central argument is that legislation can fill part of the void, which collective bargaining alone cannot fill, by reconciling the divergent interests which come to the fore during corporate reorganisations and by solving the tension between managerial prerogative and employees' rights. This task requires the law to fulfil a dual assignment: on the one hand, it has to offer protection to workers in the case of business transfers, which implies affording a measure of job security and the opportunity of meaningful participation; on the other hand, it has to guard the interests of management in achieving its economic objectives effectively.

What may seem a gargantuan task for labour and employment law -- to control and empower workers and employers in this way -- has analogous models in other areas of the law, most pertinently in administrative law. Employees who experience the exercise of managerial authority as more imminent, regular, and noticeable than that of Government authority, feel entitled to fair treatment from management officials, for many of the same reasons which allow a citizen to be treated fairly in its dealings with Government. As a result workers demand the respect of employers for values such as rationality, due process and respect for individual rights. The rights of employees derive from the importance of work for financial security and for defining

personal integrity, and also from the contribution which employees make towards the efficiency and productivity of the enterprise. Regard for employees' rights entails that employees should not necessarily be expected to shoulder the burden of corporate restructurings, without having had some opportunity to participate in the decision-making process, and without being satisfied that the decision was made in accordance with rational standards. The application of rational standards will indicate circumstances under which the protection of employees' rights have to give way to clear business needs which may be of an economic, technical or organisational nature. Rational standards, moreover, can designate the measure of protection of employees' claims vis-a-vis those of other creditors in the case of business insolvencies.

With the introduction of standards of industrial justice into employment law the ideal outcome is a more equal distribution of power, as well as a more efficient organisation of the workplace. The widely accepted efficiency of bureaucratic hierarchies for co-ordinating, supervising, transmitting information and adapting to changed circumstances suggests the limits of a protective ethical stance of the law. Far from advising that the imposition of legal standards and review of private bureaucratic power should overturn an efficient power structure, the argument for legal regulation allows for effective bureaucratic structures to deal with a variety of problems and contends only that the exercise of power should take place in accordance with principles of the Rule of Law and of fairness. By controlling the abuse of power the law can in fact contribute towards efficiency; it can encourage cooperation for the success of the joint enterprise of employers and employees, and promote employee involvement programs such as those adopted by sophisticated employers to induce the kind of incentive, cooperation and commitment needed to compete in a global market.

There will no doubt be difficulties in the way of creating an effective system of legal protection, particularly as regards the definition of the rights, the interpretation given by the judiciary, and industrial reality. Any attempt to explore effective ways in which the law can penetrate into the structure of labour relations -- in order to identify the effect that law can have on the power of the parties to collective bargaining, and to consider the results of legal regulation for the interests of individual employees -- must recognise the limitations of the law as to its impact and significance as an element which can influence performance, and must realise that law is only one of the forces which can act upon the labour market. Powerful economic, social and political

forces are at work in industrial society, and considerations of socio-economic policy shape and direct the form of law. Since legislation does not exist in a vacuum, an effective framework of legal rights should be part of a bold social program, aimed at recapturing full employment, propagating economic growth, providing for the needs of workers, and confronting the handicaps and ruthlessness experienced by those who are in a particularly vulnerable position because of race, sex, age or poverty. An important concern during this time of recession is the increase in the number of part-time and casual workers, mostly women and members of racial minorities, who are not organised and have never qualified for protection. The crisis created by wide-spread unemployment around the world indicates that labour law should be linked to social policies and programmes addressed at mass unemployment.¹ Ultimately, the law is but one instrument in a broad spectrum of social, economic and political concerns and its effectiveness depends upon a resolution of the problem of social order and the issue of the conditions of labour.

An awareness of the law's place in a broader scheme, however, does not imply that the law has no power to add to the thin cushion of legislative protections and to achieve some form of distributive justice. The achievement of industrial justice need not be seen as a misleading myth until supported by a more equitable economy. The experience with EC-inspired legislation in the UK, as it has developed towards more effective protection for employees in the case of business transfers, supports the general argument that with adequate procedures and sanctions, and the bodies to administer them, effective labour laws can be created to achieve industrial justice. Industrial justice demands respect for the treasured canons of political society and their introduction in the workplace; industrial justice concerns standards by which to control managerial prerogative in public and private enterprises in order to attain a more equal distribution of power and to demonstrate respect for the individual's rights. The small but significant area of business transfers illustrates the power of law to introduce standards of rationality, fairness and respect for individual rights against which to measure the legitimacy of the exercise of managerial power.

An assessment of the effects of EC-inspired legislation in the UK strengthens the case for substantial labour law reform and leads to interesting speculation as to whether similar notions might appear on the political agendas in the USA and South

¹Lord Wedderburn, R. Lewis and J. Clark eds., *Labour Law and Industrial Relations: Building on Kahn-Freund* 219-220 (Oxford 1983).

Africa in the foreseeable future. Will there be sufficient political tolerance with regard to the kind of social, moral and economical reasons which have been developed in this study for more extensive legal protection, to achieve probing labour law reform in the USA? Considering the factors mitigating against the development of a new legal setting, one cannot be overly optimistic. Very strongly embedded in the values of the American political economy is the common law assumption, based on property and contract law, that management can exercise the prerogative of deciding the direction and scope of the enterprise on behalf of shareholders. Against this legal and economic premise any legal intervention to establish rights for workers and change the workplace to a more participatory environment will be seen as a momentous step with unpredictable results for both workers and management. As a consequence one can expect that even if legislative action manages to secure protective and participatory rights for employees, the interpretation of such rights will be limited in accordance with the values of the free market and managerial efficiency prevailing in the political and legal culture.

The general ambivalence about where to draw the line between labour law rights for employees and other important values with which they come into conflict can only be overcome if the community makes the social judgement that protection for workers and a meaningful employee voice in the workplace can benefit workers and the broader political economy. On the same basis that the authors of the United States Constitution created a document to draw disparate interests together, to establish a common ground and to protect the fundamental rights of all the people, a strategy of labour law reform could be launched to serve deeper political values. As citizens of the workplace every American worker is aware of the power which management wields over a host of issues in his or her life. For most employees who are committed to a career in a particular firm, and who experience difficulty when forced to change careers midway, the issues are often more material than those commonly addressed by municipal councils or other administrative bodies. They can therefore advance a strong moral claim to enjoy the protection of some basic rights which correspond to those which are highly regarded in liberal society, such as due process of law, reasonableness and the opportunity of participation. Participation can take place through a variety of institutional options, including the kind of employee involvement programs which have become part of the evolving pattern in human resource management, or the more traditional larger union that can bargain for

contract benefits with the employer and help enforce legal rights which the Government provides for workers. As far as participation is concerned, legally the first step should be to provide all employees with a guarantee that a representative, elected and informed body of workers will be able to serve their interests.

An appeal to the general public for labour and employment law reform along the lines suggested in this study, could be strengthened by emphasizing that the proposed reform concerns the basic needs of workers, not unions.² Whatever the advantages of collective bargaining -- and there are many -- one cannot overlook the significant attrition in union representation in the USA and the estimated fall in private sector union coverage to less than fifteen percent. In part this decline in union membership can be ascribed to successful employer resistance to unionization. Opposition of American business centres around the inflexibility of collective bargaining and its inability to respond to changes in product and capital markets. At the same time, the image of a union that persists currently in the public's mind appears to be one of a large bureaucratic organisation which negotiates long-term contracts with the employer, without much participation by the small number of employees which it represents. The union leadership, moreover, is often perceived as having ulterior, self-interested motives which render the organisation largely undemocratic and corrupt. While this perception has endured it has become increasingly difficult to sell collective bargaining as a mechanism for voluntary, participatory problem solving.

The worst outlook on the future of collective bargaining in the USA is that the institution will become increasingly fossilized and obsolete. Hence, labour law reform which focuses on protection for individual workers, stresses their long investment in their jobs, and exposes the denial of their fundamental rights by powerful corporations, has more hope of success, even though it will doubtless take a hard and prolonged struggle to bring about such change.

In South Africa, similarly, it will take considerable toil to effect legislative changes touching upon the employer's power which is inherent in the control of the production process.³ Existing labour legislation which has as its aim the pursuit of

²The same argument is made by Paul C. Weiler, *Governing the Workplace* 301 (Cambridge, Massachusetts 1990) when he proposes a programme of legal reform to change the governance of the workplace.

³See *Kahn-Freund's Labour and the Law* ch. 1 (P.L. Davies & M. Freedland eds., 3d ed. London 1983).

industrial peace is premised, somewhat ironically, on the preservation of managerial autonomy for owners of capital in a free market society. Legislation imposes few constraints on the common law right of employers both to restructure businesses with regard only to the shareholders' profits, and to control and intimidate labour by threats to move or to close a business. Since 1979 voluntary agreements, reinforced by Industrial Court rulings on unfair labour practices, have considerably transformed the workplace and introduced standards of industrial justice and due process. But the power of capital to limit the one aspect of production over which it has historically had most control -- the labour force -- is rarely challenged. In South Africa the superior power of capital is reinforced by the degree of concentration of capital, which according to all reports is considerable.⁴ As a result, a key economic and social phenomenon is the centralisation of significant economic decision-making in a few hands.

This trend toward profound inequality and power imbalances in the workplace, has coincided with the long-awaited extension of political citizenship to all people in South Africa, including black people who had been denied their basic rights for centuries. During this time democratic values and aspirations are taking on new meaning and establishing themselves more securely in ordinary routine. With the expectation that democracy will bring solutions to some of South Africa's problems, the most fruitful strategy for reform of labour and employment legislation appears to be to stress that industrial democracy essentially complements political democracy. A democratic culture in both spheres should seek to activate and to sustain self-governance. Industrial citizenship, like political citizenship, entails rights and privileges, as well as duties and obligations. It entails that the behaviour of management be based on principles of industrial justice in order to restructure the social reality of the workplace, and to give employees the opportunity to share in the social and economic heritage of development and industrialization.

At this moment of transition in South Africa, the economic pie, of which many seek a fair share, is not very big. The deteriorating value of the Rand and the loss of international markets have given cause for concern among business leaders, and have added to a general feeling of anxiety about security and survival. Recovery from anxiety will require a renewed focus on the area of wealth creation for the benefit of

⁴See, e.g., M. Savage, "An Anatomy of the South African Corporate Economy," 7 Indus. Rel. J.S. Afr. (No.2) 4 (1987).

everyone. Questions about what policies to pursue to create a healthier economy have to take into account the suitability of statute law to establish a legal framework for the labour market. The Labour Relations Act, which has been described as being akin to a "industrial relations constitution monitored by a [C]onstitutional [C]ourt,"⁵ has been effective in setting out fundamental principles of fairness and equity, without creating patent obstacles in the path of economic prosperity.

A strong argument can be made that a more comprehensive constitution of working life which sets out basic principles of industrial justice can assist commerce. Constraints imposed on managerial decision-making, which on the one hand respect efficient hierarchical structures of business, managerial skill, competence and expertise but, on the other hand, acknowledge employees' investment of a career in the enterprise, and their need for respect, can aid day-to-day performance and productivity. Widely distributed opportunities to participate in decision-making, supported by legal provisions, can encourage all parties to recognise their reciprocal rights and responsibilities for the achievement of sound economic objectives.

Competitive pressures in a global economy call for attention to efficiency and productivity growth, but at the same time summon individual countries to identify limitations on industrial democracy and renunciation of workers' rights. Law in the USA, UK and South Africa has made a significant contribution to the evolution of contemporary patterns in labour relations and must continuously be revised to meet new economic, social and moral challenges. Reshaping the substantive rules and remedies of the law in accordance with standards of industrial justice can redefine distinctions between labour and management, prevent arbitrariness and conceivably open up avenues for mutually advantageous benefits.

⁵M.S.M. Brassey, E. Cameron, M.H. Cheadle & M.P. Olivier, *The New Labour Law* 259 (Cape Town 1987).

BIBLIOGRAPHY

Aaron, Benjamin. "Settlement of disputes over rights." Blanpain, R., ed. *Comparative Labour Law and Industrial Relations*. 3d ed. Deventer, 1987.

Anderman, Steven D. "Unfair Dismissals and Redundancy." Lewis, Roy, ed. *Labour Law in Britain*. Oxford, 1986.

Anderman, Steven D. *Labour Law: Management Decisions and Workers' Rights*. London, 1992.

Atleson, James B. *Values and Assumptions in American Labor Law*. Amherst, Massachusetts, 1983.

Baxter, Lawrence. *Administrative Law*. Cape Town, 1984.

Bellace, Janice R. "Employment Protection in the EEC." 20 *Stanford Journal of International Law* 413 (1985).

Bellace, Janice R. and Gospel, Howard F. "Disclosure of Information to Trade Unions: A Comparative Perspective." 122 *International Labour Review* 57 (1983).

Bendix, S. and Swart, S.M. "The Collective Bargaining Structure in South Africa: An Appraisal of the Present System." 2 *Industrial Relations Journal of South Africa* 1 (1982).

Benetar, D. "Successorship Liability Under Labour Agreements." 4 *Wisconsin Law Review* 1026 (1973).

Benjamin, P. "Condoning the Unprocedural Retrenchment: The Rise of the 'No Difference' Principle." 13 *Industrial Law Journal (South Africa)* 279 (1992).

Blackman, Michael. "The Employee and the Insolvent Company." 14 *Industrial Law Journal (South Africa)* 543 (1993).

Blades, Lawrence E. "Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power." 67 *Columbia Law Review* 1404 (1967).

Blankenburg, E. and Rogowski, R. "German Labour Courts and the British Tribunal System." 13 *Journal of Law and Society* 67 (1986).

Blauner, R. *Alienation and Freedom: The Factory Worker and his Industry*. Chicago, 1964.

Blumberg, Phillip I. "United States Report" (Symposium on the Protection of Workers' Rights in the Event of Insolvency and Business Reorganization). 5 *Connecticut Journal of International Law* 7 (1989).

Bok, Derek C. and Dunlop, John T. *Labor and the American Community*. New York,

- Bowers, John and Clarke, Andrew. "Unfair Dismissal and Managerial Prerogative: A Study of 'Other Substantial Reason'." 10 *Industrial Law Journal* (United Kingdom) 34 (1981).
- Brand, John and Cassim, Nazeer Ahmed. "The Duty to Disclose - A Pivotal Aspect of Collective Bargaining." 1 *Industrial Law Journal* (South Africa) 249 (1980).
- Brassey, M.S.M., Cameron, E., Cheadle, M.H. and Olivier, M.P. *The New Labour Law*. Cape Town, 1987.
- Breitenbach, Andrew. "Aspects of the South African Law on Retrenchment in the Light of English Labour Standards." 11 *Industrial Law Journal* (South Africa) 1193 (1990).
- Brewster, Chris and Teague, Paul. *European Community Social Policy*. London, 1989.
- Cameron, E., Cheadle, H. and Thompson, C. *The New Labour Relations Act*. Cape Town, 1989.
- Christie, R.H. *The Law of Contract in South Africa*. Durban, 1981.
- Cilliers, H.S. and Benade, M.L. *Corporate Law*. Durban, 1987.
- Clark, Jon. "The Juridification of Industrial Relations: A Review Article." 14 *Industrial Relations Journal* 69 (1985).
- Clegg, H.A. *Industrial Democracy and Nationalization*. Oxford, 1951.
- Collins, Hugh. "Corporatist Discipline and Capitalist Control." 11 *Industrial Law Journal* (United Kingdom) 170 (1982).
- Collins, Hugh. "Market Power, Bureaucratic Power and the Contract of Employment." 15 *Industrial Law Journal* (United Kingdom) 1 (1986).
- Collins, Hugh. "Against Abstentionism in Labour Law." Eekelaar, John and Bell, John, eds. *Oxford Essays in Jurisprudence*. Oxford, 1987.
- Collins, Hugh. "Transfer of Undertakings and Insolvency." 18 *Industrial Law Journal* (United Kingdom) 144 (1989).
- 79 Cong. Rec. 7660 (1935).
- 134 Cong. Rec. S 8375 (daily ed. June 22, 1988).
- COSATU. *Political Economy: South Africa in Crisis*. Johannesburg, 1987.
- Cox, A. "Some Aspects of the Labor Management Relations Act, 1947." 61 *Harvard Law Review* 1 (1947).
- Cox, A. and Dunlop, John T. "Regulation of Collective Bargaining by the National Labor Relations Board." 63 *Harvard Law Review* 389 (1950).

- Cox, A. "The Right to Engage In Concerted Activity." 26 *Indiana Law Journal* 319 (1951).
- Cox, A. "The Duty to Bargain in Good Faith." 71 *Harvard Law Review* 1407 (1958).
- Cox, A., Bok, D., and Gorman, R. *Labor Law: Cases & Materials*. 8th ed. Mineola, New York, 1977.
- Cox, Paul N. "Ruminations on Statutory Interpretation in the Burger Court." 19 *Valparaiso University Law Review* 287 (1984).
- Cox, Paul N. "On Debunking Labor Law Doctrine: A Review of James Atleson's Values and Assumptions in American Labor Law." 1 *Utah Law Review* 101 (1985).
- Dahl, Robert A. *A Preface to Economic Democracy*. Berkeley, 1985.
- Dahrendorf, R. *Class and Class Conflict in Industrial Society*. Stanford, California, 1959.
- Daniel, W.W. and Millward, Neil. *Workplace Industrial Relations* (The DE/PSI/ESRC Survey). London, 1983.
- Davies, P.L. and Freedland, M.R. "The Effects of Receiverships upon Employees of Companies." 9 *Industrial Law Journal* (United Kingdom) 95 (1980).
- Davies, P.L. and Freedland, M.R. *Transfer of Employment*. London, 1982.
- Davies, P.L. and Freedland, M.R., eds. *Kahn-Freund's Labour and the Law*. 3d ed. London, 1983.
- Davies, P.L. and Freedland, M.R. *Labour Law: Text and Materials*. 2d ed. London, 1984.
- Davies, P.L. "Acquired Rights, Creditors' Rights, Freedom of Contract, and Industrial Democracy." 9 *Yearbook of European Law* 21 (1989).
- Davies, P.L. and Freedland, M.R. *Labour Legislation and Public Policy*. Oxford, 1993.
- Deakin, Simon. "Legal Change and Labour Market Restructuring in Western Europe and the US." 16 *New Zealand Journal of Industrial Relations* 109 (1991).
- De la Rey, E. *Mars, The Law of Insolvency in South Africa*. 8th ed. Cape Town, 1988.
- Dennis, Patricia Diaz. "Principles That Guide My Decision-making." 15 *Stetson Law Review* 13 (1985).
- Derber, M. *The American Idea of Industrial Democracy, 1865-1965*. Urbana, 1970.
- Dickens, L., Jones, M., Weekes, B. and Hart, M. *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System*. Oxford, 1985.
- Dunlop, John Thomas. *The Industrial Relations System*. New York, 1958.

Eisenberg, Melvin Aron. "Participation, Responsiveness, and the Consultative Process: an Essay for Lon Fuller." 92 *Harvard Law Review* 410 (1978).

Epstein, Richard A. "A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation." 92 *Yale Law Journal* 1357 (1983).

Estreicher, Samuel. "Unjust Dismissal Laws: Some Cautionary Notes." 33 *American Journal of Comparative Law* 310 (1985).

Ewing, K. "Rights and Immunities in British Labour Law." 10 *Comparative Labour Law Journal* 1 (1988).

Feinman, Jay M. "The Development of the Employment at Will Rule." 20 *American Journal of Legal History* 118 (1976).

Feller, David E. "A General Theory of the Collective Bargaining Agreement." 61 *California Law Review* 663 (1973).

Flanders, A. *Management and Unions*. London, 1970.

Flanders, A. and Clegg, H.A. *The System of Industrial Relations in Great Britain*. Oxford, 1954.

Forrest, H. "Political Values in Individual Employment Law." 42 *Modern Law Review* 361 (1979).

Fox, Alan. "Industrial Relations: A Social Critique of Pluralist Ideology." Child, J., ed. *Man and Organization*. London, 1973.

Fox, Alan. *Beyond Contract*. Salem, New Hampshire, 1974.

Fredman, Sandra and Lee, Simon. "Natural Justice for Employees: The Unacceptable Faith of Proceduralism." 15 *Industrial Law Journal* (United Kingdom) 15 (1986).

Freedland, M.R. *The Contract of Employment*. Oxford, 1976.

Freedland, M.R. "The Obligation to Work and to Pay for Work." *Current Legal Problems* 175 (1977).

Fryer, R.H. "The Myths of the Redundancy Payments Act." 2 *Industrial Law Journal* (United Kingdom) 1 (1973).

Fryer, R.H. "Redundancy and Public Policy." Martin, R. and Fryer, R.H., eds. *Redundancy and Paternalist Capitalism: A study in the sociology of work*. London, 1973.

Galbraith, J.K. *American Capitalism*. Boston, 1963.

Goldberg, A. "Management's Reserved Rights: A Labor View." McKelvey, J., ed. *Management Rights and the Arbitration Process* (A publication of the National Academy of Arbitrators). Washington, 1956.

Goldberg, Stephen B. "The Labor Law Obligations of a Successor Employer." 63 *Northwestern University Law Review* 735 (1969).

Goldsmith, A. "The Management-Control Collective Bargaining Relationship: Three Models." 24 *Osgoode Hall Law Journal* 775 (1986).

Gorman, R. *Basic Text on Labor Law: Unionization and Collective Bargaining*. St. Paul, 1976.

Gospel, Howard F. "Disclosure of Information to Trade Unions." 5 *Industrial Law Journal* (United Kingdom) 223 (1976).

Gower, L.C.B. *Modern Company Law*. 3d ed. London, 1969.

Gower, L.C.B. *Principles of Modern Company Law*. 5th ed. London, 1992.

Haggard, T. and Pulliam, M. *Conflicts Between Labor Legislation and Bankruptcy Law*. Industrial Research Unit, Wharton School, University of Pennsylvania, Philadelphia, 1987.

Hanami, T. and Blanpain, R. *Industrial Conflict Resolution in Market Economies*. Deventer, 1984.

Harper, Michael C. "Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining." 68 *Virginia Law Review* 1447 (1982)

Hayek, F.A. *The Constitution of Liberty*. Chicago, 1960.

Hayek, F.A. 1 *Law, Legislation and Liberty*. Chicago, 1973.

Hayek, F.A. 3 *Law, Legislation and Liberty*. Chicago, 1982.

Hayek, F.A. *1980s Unemployment and the Unions. Essays on the impotent price structure of Britain and monopoly in the labour market*. 2d ed. London, 1984.

Henry, Sue J. "Is There Arbitration After Burns?: The Resurrection of John Wiley & Sons." 31 *Vanderbilt Law Review* 249 (1978).

Hermann, Donald H.J. and Sor, Yvonne S. "Property Rights in One's Job: The Case for Limiting Employment-At-Will." 24 *Arizona Law Review* 763 (1982).

Hepple, B.A. "Workers' Rights in Mergers and Takeovers: The EEC Proposals." 5 *Industrial Law Journal* (United Kingdom) 197 (1976).

Hepple, B.A. "Council Directive of February 14, 1977, on the approximation of the laws of the Member States, relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses." 6 *Industrial Law Journal* (United Kingdom) 106 (1977).

Hepple, B.A. "The Transfer of Undertakings (Protection of Employment) Regulations." 11 *Industrial Law Journal* (United Kingdom) 29 (1982).

Hepple, B.A. "Individual Labour Law." Bain, G.S., ed. *Industrial Relations in Britain*. Oxford, 1983.

Hepple, B.A. "Harmonisation of Labour Law in the European Communities." Adams, J., ed. *Essays for Clive Schmitthof*. Abingdon, Oxon., 1983.

Hepple, B.A. "Restructuring Employment Rights." 15 *Industrial Law Journal* (United Kingdom) 69 (1986).

Hepple, B.A. "The Crisis in EEC Labour Law." 16 *Industrial Law Journal* (United Kingdom) 77 (1987).

Hepple, B.A. "Labour Courts: Some Comparative Perspectives." 41 *Current Legal Problems* 169 (1988).

Hepple, B.A. "The Harmonisation of Labour Law in the EEC: A British Perspective." 6 *Recht der Arbeit* 348 (1989).

Hepple, B.A. "The Implementation of the Community Charter of Fundamental Social Rights." 53 *Modern Law Review* 643 (1990).

Hepple, B.A. *Main Shortcomings and Proposals for Revision of Council Directive 77/187/EEC*. December 1990. (Report for the Commission of the European Communities, unpublished).

Hepple, B.A. "The Fall and Rise of Unfair Dismissal." McCarthy, W., ed. *Legal Intervention in Industrial Relations*. Oxford, 1992.

Hepple, B.A. and Byre, Angela. *The Application of EEC Labour Law in the United Kingdom*. September 1988. (Study commissioned by the Directorate General for Employment, Social Affairs and Education of the Commission of the European Communities).

Hepple, B.A. and Byre, Angela. "EEC Labour Law in the United Kingdom - A New Approach." 18 *Industrial Law Journal* (United Kingdom) 129 (1989).

H.R. Rep. No. 245, 80th Cong., 1st Sess. 49, 71 (1947). 1 NLRB, *Legislative History of the Labor-Management Relations Act, 1947*. Washington D.C., 1948. (fn. 50)

Hulser, Raymond N. "The Rejection of Collective Bargaining Agreements in Chapter 11 Reorganisations: The Need for Informed Judicial Decisions." 134 *University of Pennsylvania Law Review* 1235 (1986).

Hurvitz, Haggai. "American Labor Law and the Doctrine of Entrepreneurial Property Rights: Boycotts, Courts, and the Juridical Reorientation of 1886-1895." 8 *Industrial Relations Law Journal* 307 (1986).

Hyman, R. "Pluralism, Procedural Consensus and Collective Bargaining." 16 *British Journal of Industrial Relations* 16 (1978).

Hyman, R. *The Political Economy of Industrial Relations*. London, 1989.

International Labour Office. *Conciliation and Arbitration Procedures in Labour Disputes*. Geneva, 1980.

Jacoby, Sanford M. "The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis." 5 *Comparative Labour Law* 85 (1982).

Jensen, Michael C. and Meckling, William H. "The Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure." 3 *Journal of Financial Economics* 305 (1976).

Jergesen, Allan D. "The Legal Requirements of Consultation." *Public Law* 290 (1978).

Jordaan, B. "Transfer, Closure and Insolvency of Undertakings." 12 *Industrial Law Journal* (South Africa) 935 (1991).

Jowell, K. "Of Invention and Intervention: Collective Bargaining after Wiehahn." 3 *Indicator South Africa* 14 (1986) (Publication of Centre for Applied Social Sciences, University of Natal, Durban).

Kahn-Freund, O. "Contemporary note on the decision in *Nokes v. Doncaster Amalgamated Collieries Ltd.*, [1940] App. Cas. 1014 (H.L.)." 4 *Modern Law Review* 221 (1941).

Kahn-Freund, O. *The Institutions of Private Law and Their Social Functions*. Renner, K. ed. London, 1949.

Kahn-Freund, O. "Labour Law." Ginsberg, Morris, ed. *Law and Opinion in England in the Twentieth Century*. London, 1959.

Kahn-Freund, O. "Labour Law." *Selected Writings of Otto Kahn-Freund*. London, 1978.

Kassalow, E. *Trade Unions and Industrial Relations: An International Comparison*. New York, 1969.

Katz, Harry C. "Automobiles." Lipsky, David B. and Donn, Clifford B., eds. *Collective Bargaining in American Industry: Contemporary Perspectives and Future Directions*. Lexington, Massachusetts, 1987, 13.

Kerr, C., Dunlop, J.T., Harbison, F.H. and Myers, C.A. *Industrialism and Industrial Man*. Cambridge, Massachusetts, 1962.

Klare, Karl E. "The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law." 61 *Oregon Law Review* 157 (1982).

Klare, Karl E. "Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin." 44 *Maryland Law Review* 731 (1985).

Kochan, Thomas A., Katz, Harry C. and Mower, Nancy R. *Worker Participation and American Unions: Threat or Opportunity?* Kalamazoo, Mich.: W.E. Upjohn Institute,

1984.

Kohler, Thomas C. "Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)." 27 Boston College Law Review 499 (1986).

Lewis, R. "The Historical Development of Labour Law." 14 British Journal of Industrial Relations 1 (1976).

Lewis, Paul. *Twenty Years of Statutory Redundancy Payments in Great Britain*. Leeds-Nottingham Occasional Papers in Industrial Relations, 1987.

Litvin, Richard. "Fearful Asymmetry: Employee Free Choice and Employer Profitability in First National Maintenance." 58 Indiana Law Journal 433 (1983).

Lodge, George C. and Vogel, Ezra F., eds. *Ideology and National Competitiveness: An Analysis of Nine Countries*. Boston, Massachusetts, 1986.

Lynd, Staughton. "Investment Decisions and the Quid Pro Quo Myth." 29 Case Western Reserve Law Review 396 (1979).

Lyon-Caen, A. and Mariucci, L. "The State, Legislative Intervention and Collective Bargaining: A Comparison of Three National Cases." 1 International Journal of Comparative Labour Law and Industrial Relations 87-107 (1987).

Lyon-Caen, Gerard. "Du Role des Principes Generaux du Droit Civil en Droit du Travail (Premiere Approche)." Revue Trimestrielle de Droit Civil 229 (1974).

McCarthy, W.E.J. "The Case for Labour Courts." 21 Industrial Relations Journal 98 (1990).

McMullen, John. "Management Prerogative, Reorganisation and Employees' Rights on Transfers of Undertakings" 49 Modern Law Review 524-529 (1986).

Mazzocchi, Anthony. "Changing Economic Realities and the Changing Role of Unions." 11 New York University Review of Law and Social Change 7 (1983).

Meltzer, B. *Labor Law: Cases, Materials & Problems*. 2d ed. Boston, 1977.

Millward, Neil and Stevens, Mark. *British Workplace Industrial Relations (The DE/ESRC/PCI/ACAS Surveys)*. Aldershat, 1986.

Millsbaugh, Peter E. "Plant Closings and the Prospects for a Judicial Response." 8 Journal of Corporate Law 483 (1983).

Morris, Charles J. and Gaus, William. "Successorship and the Collective Bargaining Agreement: Accommodating Wiley and Burns." 59 Virginia Law Review 1359 (1973).

Mueckenberger, Ulrich and Deakin, Simon. "From Deregulation to a European Floor of Rights: Labour Law, Flexibilisation and the European Single Market." 3 Zeitschrift fur auslandisches und internationales Arbeits- und Sozialrecht 153 (1989).

Murphy, "Plant Relocation and the Collective Bargaining Obligation." 59 North Carolina Law Review 5 (1980).

Napier, Brian. "Retention of the Job in the Event of Change in Structure of the Enterprise - Legal Aspects." 3 International Journal of Comparative Labour Law and Industrial Relations 158 (1987).

Napier, Brian. *CCT, Market Testing and Employment Rights: The Effects of TUPE and the Acquired Rights Directive*. Streatham, 1993. (Publication sponsored by the Institute of Employment Rights).

Nicholls, D. *Three Varieties of Pluralism*. London, 1974.

Nicol, M. "Legislation, Registration, Emasculation." 5 South African Labour Bulletin (Nos. 6 & 7) 44 (1980).

Note. "Labor Law - Effect on Successor Employer of Predecessor's Collective Bargaining Agreement." 86 Harvard Law Review 247 (1972).

Note. "Contractual Successorship: The Impact of Burns." 40 University of Chicago Law Review 617 (1973).

Note. "The Supreme Court, 1980 Term." 95 Harvard Law Review 91 (1981).

Note. "Mandatory Bargaining and the Disposition of Closed Plants." 95 Harvard Law Review 1896 (1981).

Opinion of the Economic and Social Committee. Official Journal of the European Commission (No. C 155) 25 (1975).

Parker, S.R., Thomas, C.G., Ellis, N.D. and McCarthy, W.E.J. *Effects of the Redundancy Payments Act*. London, 1971.

14 Parl. Deb., H.C. (6th series) cols. 677, 680, 695, 696 (7 December 1981). (fn. 71)

17 Parl. Deb., H.C. (6th series) col. 741 (8 February 1982). (fn. 29)

214 Parl. Deb., H.C. (6th series) col. 340 (19 November 1992). (fn. 99)

216 Parl. Deb., H.C. (6th series) col. 537 (11 January 1993). (fn. 99)

Piore, Michael J. "Notes for a Theory of Labor Market Stratification." Edwards, R.C., Reich, M. and Gordon, D.M., eds. *Labor Market Segmentation*. Lexington, Massachusetts, 1975.

Posner, R.A. "Some Economics of Labor Law." 51 University of Chicago Law Review 988 (1984).

Public Services Privatisation Research Unit. *Privatisation, Disaster for Quality*. London, March 1992.

Rautenbach, N.F. "In Search of the Severance Package." 12 *Industrial Law Journal* (South Africa) 735 (1991).

Report of the Royal Commission on Trade Unions and Employers Associations (Donovan Commission). Cmnd. 3623. United Kingdom, 1968.

Report of the Commission of Enquiry into Labour Legislation. Part 1 RP 47 IV. South Africa, 1979.

Report of the National Manpower Commission for the period 1 January 1982 to 31 December 1982. RP 45. South Africa, 1983.

Report of Labour Research Service (Bargaining Indicators 1991: Review of Economic Conditions to be Expected in South Africa in 1991). Cape Town, 1991.

Rideout, R.W. "The Great Transfer of Employee Rights Hoax." 35 *Current Legal Problems* 236 (1982).

Rosenberg, Rosalind. "Bankruptcy and the Collective Bargaining Agreement - A Brief Lesson in the Use of the Constitutional System of Checks and Balances." 58 *American Bankruptcy Law Journal* 293 (1984).

Rothstein, Lawrence E. *Plant Closings: Power, Politics, and Workers*. Dover, Massachusetts, 1986.

St. Antoine, Theodore J. "You're Fired." 10 *Human Rights* 32 (1982).

St. Antoine, Theodore J. "Federal Regulation of the Workplace in the Next Half Century." *Chicago-Kent Law Review* 631 (1985).

Savage, M. "An Anatomy of the South African Corporate Economy." 7 *Industrial Relations Journal of South Africa* (No. 2) 4 (1987).

Severson, James and Willcoxon, Michael. "Successorship Under Howard Johnson: Short Order Justice For Employees." 64 *California Law Review* 795, 844 (1976).

Shedlin, Leslie K. "Regulation of Disclosure of Economic and Financial Data and the Impact on the American System of Labor-Management Relations." 41 *Ohio State Law Journal* 441 (1980).

Silver, Jonathan F. "Reflections on the Obligations of a Successor Employer." 2 *Cardozo Law Review* 545 (1981).

Simpson, Bob. "British Labour Relations in the 1980s: Learning to Live with the Law." 49 *Modern Law Review* 796 (1986).

Slicker, Frederick K. "A Reconsideration of the Doctrine of Employer Successorship - A Step Toward a Rational Approach." 57 *Minnesota Law Review* 1051 (1973).

Smith, Catherine. *The Law of Insolvency*. 3d ed. Durban, 1988.

Summers, Clyde W. "Labor Law in the Supreme Court: 1964 Term." 75 *Yale Law Journal* 59 (1965).

Summers, Clyde W. "Industrial Democracy: America's Unfulfilled Promise." 28 *Cleveland State Law Review* 29 (1979).

Summers, Clyde W. "Worker Participation in the US and West Germany: A Comparison from an American Perspective." 28 *American Journal of Comparative Law* 367 (1980).

Summers, Clyde W. "Past Premises, Present Failures, and Future Needs in Labor Legislation." 31 *Buffalo Law Review* 9 (1982).

Swift, R. *NLRB and Managerial Decision-Making*. The Wharton School Industrial Relations Unit, University of Pennsylvania, Labor Relations and Public Policy Series, Rep. No. 9, 1974.

Thompson, Clive. "Collective Bargaining." Robertson, M., ed. [1991] 2 *South African Human Rights and Labour Law Yearbook*. Cape Town, 1992.

Thompson, Clive. "Trade Unions Using the Law." Corder, Hugh, ed. *Law and Social Practice*. Cape Town, 1988.

Tomlins, Christopher L. *The State and the Unions. Labor Relations, Law and the Organized Labor Movement in America, 1880-1960*. Cambridge, 1985.

Towers, B. "Derecognising Trade Unions." 19 *Industrial Relations Journal* 181 (1988).

Usher, Dick. "Developments in the Trade Union Movement." Robertson, M., ed. [1991] 2 *South African Human Rights and Labour Law Yearbook*. Cape Town, 1992.

Van Wezel Stone, K. "Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities." 55 *University of Chicago Law Review* 73 (1988).

Vian, John. "The Rejection of Collective Bargaining Agreements Since the 1984 Amendments: The Case Law under the New Bankruptcy Code sec. 1113." 91 *Commercial Law Journal* 252 (1986).

Von Prondzynski, Ferdinand. "The Changing Functions of Labour Law." Fosh, P. and Littler, C.R., eds. *Industrial Relations and the Law in the 1980s*. Aldershat, Hants, England, 1985.

Webb, S. and Webb, B. *Industrial Democracy*. London, 1902.

Wedderburn, K.W., Lewis, R. and Clark, J. eds. *Labour Law and Industrial Relations: Building on Kahn-Freund*. Oxford, 1983.

Wedderburn, Lord. "Industrial Relations and the Courts." 9 *Industrial Law Journal* (United Kingdom) 65 (1980).

Wedderburn, Lord. "The New Policies in Industrial Relations Law." Fosh, P. and

Littler, C., eds. *Industrial Relations and the Law in the 1980's: Issues and Future Trends*. Aldershat, 1985.

Wedderburn, Lord. *The Worker and the Law*. 3d ed. London, 1986.

Wedderburn, Lord. "Labour Law: Autonomy from the Common Law?" 9 *Comparative Labour Law Journal* 219 (1987).

Wedderburn, Lord. "Labour Law: From Here to Autonomy?" 16 *Industrial Law Journal* (United Kingdom) 1 (1987).

Wedderburn, Lord. "The Social Charter in Britain - Labour Law and Labour Courts." 54 *Modern Law Review* 1 (1991).

The Weekly Mail, March 1 to March 7 1991, quoting Neil Coleman.

Weiler, Paul C. "Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA." 96 *Harvard Law Review* 1769 (1983).

Weiler, Paul C. *Governing the Workplace*. Cambridge, Massachusetts, 1990.

Weiss, M., Simitis, S. and Rydzy, W. "The Settlement of Labour Disputes in the Federal Republic of Germany." Hanami, T. and Blanpain, R., eds. *Industrial Conflict Resolution in Market Economies*. Deventer, 1984.

Wellington, H. *Labor and the Legal Process*. New York, 1968.

Wood, Horace G. *A Treatise on the Law of Master and Servant*. Albany, New York, 1877.

Workplace Closures and Company Reorganizations: Enforcing NLRB, Contract and Non-Contract Claims and Obligations, Paper presented at the Twenty-Second Teamsters Lawyers Conference, New Orleans, Louisiana, 1989.

Yemin, E. *Workforce Reductions in Undertakings*. International Labour Office, Geneva, 1982.

Younson, F. *Employment Law and Business Transfers: A Practical Guide*. London, 1989.

